IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1621

ROBERT L. VESCO,

Petitioner,

v.

INTERNATIONAL CONTROLS CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1979

No.

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PETITION FOR A WRIT OF CERTIORARI
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PRELIMINARY STATEMENT

Petitioner, Robert L. Vesco, respectfully prays that a writ of certiorari be issued to review the judgment, order and decision of the United States Court of Appeals for the Second Circuit, entered in two cases on January 24, 1979.

Although the Respondent may argue that the actions sought to be reviewed herein have been before this Court on three prior occasions concerning other or similar matters, the questions raised in this petition have never been before this Court, and the Petitioner has never sought previous access to this Court.

On the three previous occasions, this Court has declined to

issue the writ on the questions then raised.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is presently unreported, but appears in full beginning at page "A1" of the Appendix included herein.

JURISDICTION

The judgment and decision of the Court of Appeals for the Second Circuit was entered on January 24, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the particular methods of service of process as directed by the District Court against the Petitioner comports with due process.

2. Whether service of process under Rule 4(i), or more specifically, under Rule 4(i)(1)(E) of the Federal Rules of Civil Procedure, must afford "actual notice."

3. Whether the District Court below, in directing the particular methods of service of process under Rule 4(i)(1)(E), so far departed from the accepted and usual course of judicial procedure, and whether the Court of Appeals so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's

powers of supervision.

4. Whether the various and several methods of service of process as specifically directed by the District Court were so materially different as to justify inconsistent results, thereby denying the Petitioner due process; i.e. does a prospective defendant have a right to know when there has been proper service consistent with due process.

5. Whether the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters is subordinate or equivalent to the Federal Rules of Civil Procedure, or more particularly, whether Rule 4(i)(1)(E), providing for service of process in a foreign country

"as directed by order of the court," must be applied within the terms of the Convention.

6. Whether the Convention is applicable to service of process in the independent Commonwealth of the Bahamas.

7. Whether the Court of Appeals so far departed from the accepted and usual course of international law and procedure as to call for an exercise of this Court's powers of supervision.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

1. Constitutional Provisions

"[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. 14, Section 1.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art. 6.

The Bahamas Independence Order 1973, Article 4, Operative July 10, 1973 (A123).

2. Treaties

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, The Hague, November 15, 1965, Effective February 10, 1969 (A115).

3. Statutes

Jurisdiction is asserted by Respondent based upon Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa):

"The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction

of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under chapter brought by or against it in the Supreme Court or such other courts."

4. Rules

A. Federal Rules of Civil Procedure

"Rule 4(i) Alternative Provisions

for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

"(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court."

"Rule 82. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

B. Yearbook of the International Law Commission

"2. When a successor State [the Commonwealth of The Bahamas] communicates to the third State [member nations of the United Nations, including the United States] a declaration expressing its consent to the provisional application of such treaties pending a decision with regard to their maintenance in force, modification or termination, the treaties shall continue to apply provisionally as between the successor State and the third State unless in the case of a particular treaty:

"(a) The treaty comes into force automatically as between the States concerned under general international law

independently of the declaration; or

"(b) It appears from the treaty or is otherwise established that the application of the treaty in relation to successor State would be incompatible with its object and purpose; or

"(c) Within three months of receiving the notification the third State in question has informed the successor State of its objection to such provisional application of the treaty." Yearbook of the International Law Commission, Art. 4, subd. 2, "Unilateral Declaration By a Successor State," Vol. II (1969).

STATEMENT OF THE CASE

1. The Consolidated Actions

The Court of Appeals for the Second Circuit consolidated for review two appeals by the Petitioner, Robert L. Vesco, (1) from an order of Judge Charles E. Stewart, Jr., United States District Judge for the Southern District

of New York, entered February 1, 1978, denying a motion pursuant to F.R.C.P. Rule 60(b)(4) to vacate a default judgment entered against the Petitioner on October 5, 1973 (A50); and (2) from another order (A113) of Judge Stewart entered on May 3, 1978, denying a motion by Petitioner in an entirely different action to vacate a default judgment. Judge Stewart's opinions in the two cases are not officially reported. It is these two opinions that the Court of Appeals affirmed, and it is the Court of Appeals decision from which the Petitioner prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered January 24, 1979. (A1)

2. The Basis for Federal Jurisdiction

The Respondent, International Controls Corp. ("ICC"), instituted the first action on June 7, 1973, entitled ICC v. Robert L. Vesco, et al., Civil Docket No. 73 Civ. 2518 (the "2518 action"). The complaint generally alleged that the Petitioner, together with numerous other named defendants, did by means of interstate commerce and the national securities exchanges defraud Respondent and its stockholders in violation of the Securities Exchange Act of 1934 (15 U.S.C. §78aa). The alleged violation of the securities laws is the sole basis for federal jurisdiction in the 2518 action.

The second action was commenced on April 8, 1974, entitled International

Controls Corp. v. Robert L. Vesco, Civil Docket No. 74 Civ. 1588 (the "1588 action"). The complaint alleged breach of the Petitioner's fiduciary duty as president and chairman of the board of directors of ICC, and violation of Rule 10b-5 of the Rules of the Securities and Exchange Commission. Federal jurisdiction was invoked under 28 U.S.C. §§1331, 1332.

3. The District Court Proceedings

"Service" in the 2518 Action

In an order dated July 27, 1973, but entered July 31, 1973, Judge Stewart appointed Lois S. Yohonn, Esq., a lawyer associated with Shea Gould Climenko & Kramer, predecessor attorneys of record for Respondent, ICC, to

"effect service of process in the [2518] action on defendant, Robert L. Vesco." (A36) In an order dated July 29, 1973, but entered July 31, 1973, Judge Stewart ordered that:

> "[S]ervice of process upon said defendant Robert L. Vesco may be effected by depositing a copy of the summons and complaint herein upon the premises of the last known residence of said defendant located in Nassau, Bahamas, and mailing a copy of the summons and complaint herein to said defendant at the address of such last known residence in Nassau, Bahamas." (A37)

Both applications resulting in the above orders were granted ex parte, the grounds for such orders being explained by Circuit Judge Medina in his Court of Appeals decision as follows:

> "The reason for the order, and another order to which we shall refer later, was that from the SEC proceedings mentioned in the preliminary part of this opinion

> Vesco was known to be not averse to evading the service of process. Thus actual delivery of the summons and complaint to Vesco in person was not required." (A17)

In an affidavit sworn to on August 6, 1973, Ms. Yohonn described her inability to locate the Petitioner in the environs of Nassau, The Bahamas, but narrated her valiant efforts in serving the Petitioner at his "residence," afterwards "becoming seriously concerned for [her personal] safety." (A38)

On the basis of Ms. Yohonn's affidavit of service, a default judgment was entered against the Petitioner on October 5, 1973. (A50) Judge Stewart, United States District Judge for the Southern District of New York, subsequently denied Petitioner's motion to vacate the default judgment despite the

obvious questions raised in Petitioner's undated affidavit filed November 17, 1977 contesting service. (A80)

On September 7, 1973, Respondent filed an amended complaint. As to service of the amended complaint, Judge Stewart authorized Messrs. Bondi and others to "leave" the process at the "residence" of the Petitioner in Nassau, The Bahamas:

> "ORDERED, that service of process upon any of said defendants [including Petitioner] may be (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) as to individual defendants, by leaving a copy of the summons and amended complaint herein upon the premises of such defendant's last known residence located in Nassau, Bahamas and mailing a copy thereof to such defendant at either the Post Office Box of such defendant or to the address of such last known residence of such defendant in Nassau, Bahamas...." (A29)

The Court of Appeals affirmed the District Court's holding that service of the amended complaint was defective on the grounds that the "summons and [amended] complaint had not been 'left' at Vesco's residence." (A29)

"Service" in the 1588 Action

Upon the affidavit of Ms. Yohonn sworn to on April 8, 1974 (A99) Judge Stewart issued an order entered April 9, 1974 appointing David M. Butowsky, a member of the firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov, and appointed special counsel to ICC by Judge Stewart. (A102)

In his affidavit sworn to on April 22, 1974, Mr. Butowsky described how he served process in the 1588

action at the "premises" of the Petitioner:

> "Upon my arrival at such premises I proceeded to a gate and was confronted by two men who stopped me from entering upon the premises. I held out the summons and complaint and stated that I would like to hand the envelope to Mr. Vesco. One of the guards stated to me 'we are instructed not to accept any papers'. Thereupon I dropped the envelope on the driveway and requested the guard to hand it to Mr. Vesco. He remained mute and I took leave of the premises." (A107)

On the basis of the described service, default judgment was entered against the Petitioner on September 11, 1974. (A110) Judge Stewart denied Petitioner's motion to vacate in an endorsed decision entered May 3, 1978. (A113)

4. The Decision of the Court of Appeals

Upon appeal to the Second Circuit, the 2518 and 1588 actions

were consolidated, Medina, J., speaking for the Court of Appeals, affirmed Judge Stewart's decision in the District Court upholding service of the summons and complaint by the methods above-described, and agreeing with Judge Stewart that service of the amended complaint was defective and jurisdictionally fatal. (A1-33)

In affirming the lower court, the Court of Appeals held that the international Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters was inapplicable to service of process in the Commonwealth of the Bahamas (A24-27), or if applicable the methods of service prescribed by F.R.C.P. Rule 4 controls the jurisdictional

question. (A27)

Under the several and various methods of service as directed by the District Court, the Court of Appeals saw no material differences in the interpretation and application of the orders of service to justify inconsistent results between service of the amended complaint and the other process.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS, BY NOT SETTING ASIDE THE SERVICE IN THE 2518 AND 1588 ACTIONS, HAS ACCEPTED AND CONDONED A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW WHICH CALLS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Departure of the District Court from the Accepted and Usual Course of Judicial Proceedings

The Court of Appeals reasoned that F.R.C.P. Rule 4(i)(1)(E) permitted the District Court "to tailor the manner of service to fit the necessities of [the] particular case." (A19) Advisory Committee's Note of 1963 to Rule 4(i)(1)(E). The Court of Appeals relies on the decisions of this Court in upholding the methods of service in these actions:

> "The Supreme Court has long recognized that no one form of substitute service is favored over any other so long as the method chosen is reasonably calculated, under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit and an opportunity to present his defense. The constitutional determination is derived from the necessities of each case rather than from a preconceived notion of what will provide actual notice in every case." (A19-20)

Each of the methods of service under Rule 4(i), including service "as directed by order of court" under subdivision 4(i)(1)(E), is and should be calculated to give "actual notice": (1) subdivision "(A)" prescribes service according to the rules of the subject foreign country; (2) subdivision "(B)" requires service to be "reasonably calculated to give actual notice"; (3) subdivision "(C)" prescribes personal

delivery; and (4) subdivision "(D)" necessitates a "signed receipt." Contrary to the view of the Court of Appeals, the scheme of Rule 4(i) does provide for a preconceived notion of actual notice to be applied to the necessities of the case. Judge Medina would have the exigencies of the case dictate whether actual notice is feasible or even necessary. The initial question determining the method of service under Rule 4(i)(1)(E) "as directed by order of court" is how actual notice may be given under the particular circumstances of the case, and not what type of notice (actual or otherwise) the circumstances will bear:

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one

> desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected ... or where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950)." (Citations omitted) (Emphasis supplied)

Therefore, both the District Court and the Court of Appeals erred as to the basic premise of Rule 4(i): an order directing service under subdivision "(E)" must in the first instance conform the method of service to giving actual notice with secondary regard to the hardship created under the circumstances.

In the present case, there

was no real attempt to personally serve the Petitioner. In both the 2518 and 1588 actions, service was effected in less than 24 hours of the arrival in Nassau, the Bahamas, of the appointees. No effort to personally serve a prospective defendant need ever be necessary under the interpretation by the Second Circuit of Rule 4(i). Customarily, fair notions of due process require an attempt to serve a defendant personally before substituted service is permitted (e.g. N.Y. Civil Practice Law and Rules §308 subd. (4) so provides).

Furthermore, the more difficult the circumstances of serving a prospective defendant, the more the parties interested in the case, including the attorneys appearing of record in one

capacity or another, should disassociate themselves from the crucial service of process. Ms. Yohonn was associated with the attorneys of record for the Plaintiff-Respondent, ICC; Mr. Butowsky was appointed Special Counsel for ICC. In hearing an application by an attorney representing a petitioning creditor for authorization to serve crucial process in the action, the Second Circuit stated that an "attorney stands in the same relationship as the party" and cannot, and should not be appointed as process server. In Re Evanishyn, 1 F.R.D. 202 (S.D.N.Y. 1939), aff'd on other grounds 107 F.2d 742 (2d Cir. 1939).

It appears from the Court of Appeals decision in this case that the Second Circuit's present view of due

process includes the voluntary surrender of prospective defendants to marauding process servers. Even under general notions of due process within a civilized system of law, no natural person has been compelled to make himself or herself available for service of process. To assume otherwise would dispense with service of process in its entirety, except for retaining archaic methodology under historical legal tradition.

Under the circumstances here presented, both lower courts so far departed from the accepted and usual course of judicial procedure, as to call for an exercise of this Court's power of supervision. The particular methods of service described in the orders of Judge Stewart (A36 and A102) do not comport with due process. There

is no real material difference between "depositing" process and "leaving" process at the last known "residence" of the Petitioner.

Both Judges Medina and Stewart agreed that Ms. Yohonn had complied with the order directing service by "depositing" the process at the purported "residence" of the Petitioner, but that service of the amended complaint in the 2518 action was defected and therefore invalid because the process happened to be "thrown back" and carried off in the process server's car, thereby not being "left" at the premises. (A28-29) The deficiency of due process concerning each of the attempted "services" is blatant considering the inconsistent results between substantially the same

types of service of the original and amended complaints. It would appear that if a mere "deposit" of the process was required, then whatever happened to the process thereafter is inconsequential; if merely "leaving" the process was all that was necessary, then whatever happened to the process after being "left" is also inconsequential. The reasonable conclusion is the same in each instance. The prospective defendant receives no actual notice of the process under each "method," but is subject to <u>in personam</u> jurisdiction in one instance, but not in the other. Either all the services of process are valid, or all are defective.

Allowing Judge Stewart to arbitrarily interpret his orders after the fact is abhorrent to standards of

due process. The obvious question here is whether the orders directing service were "tailored" to the circumstances, or whether the circumstances of service were "tailored" to the terms of the orders.

A prospective defendant should have the right firstly, to know that he or she has been served with process (i.e. "actual notice"), and secondly, when he or she has been properly served: "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314 (1950). No solace can be found in the fact that a prospective defendant is aware of judicial proceedings: "[N]o jurisdiction is acquired

over a defendant defectively served merely because he has full knowledge of the proceedings against him." Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928). Kadet-Kruger & Co. v. Celanese Corp. of Amer., 216 F.Supp. 249 (N.D. Ill. 1963).

II

F.R.C.P. RULE 4(i)(1)(E) MUST BE APPLIED WITHIN THE TERMS OF THE INTERNATIONAL CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

A. The Status of the Convention

"Congress has undoubted power to regulate the practice and procedure of federal courts and may exercise that power by delegating to the Supreme Court or other federal courts authority

to make rules not inconsistent with the statutes or Constitution of the United States. 32 Am.Jr.2d, Federal Practice and Procedure, §15. Although the Federal Rules of Civil Procedure have the force and effect of a federal statute, they are not accorded the status of "federal law" and cannot be inconsistent with the statutes or Constitution of the United States. Sibbach v. Wilson & Co., 312 U.S.1, 9-10 (1940) reh. denied 312 U.S. 713. "Plainly the Rules are not acts of Congress and can not [sic] be treated as such." 312 U.S. at 18.

The United States Constitution provides as follows:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall

> be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art. 6

By the Constitution a treaty has the same status as an act of congressional legislation. Both are declared to be the "supreme law of the land" and no superior efficacy is given to either one over the other. Whitney v. Robinson, 124 U.S. 194 (1888).

The Federal Rules of Civil Procedure, although having the force and effect of federal law, are not accorded the same status as the Constitution, federal statutes, or treaties. The Rules are not the "supreme law of the land." Sibbach v. Wilson & Co., supra.

In Tamari v. Bache & Co., 431 F.Supp. 1226 (N.D. Ill. 1977), the District Court considered F.R.C.P. Rule 4(i) in relation to the international Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Convention"), The Hague, November 15, 1965, entered into force February 10, 1969, 20 U.S.T. 361, TIAS No. 6638, 658 UNTS 163. (A115) The District Court for the Northern District of Illinois stated, "[W]e are persuaded by the reasoning of the California court in finding that the treaty [i.e. Convention] was not meant to abrogate the provisions of Rule 4, as evidenced by the fact that there has been no change in the provisions of the Rule since the treaty became effective." 431 F.Supp. at

1229, citing Shoei Kako Co., Ltd. v. Superior Court, 33 C.A.3d 808, 109 Cal. Rptr. 402 (1973).

Agreeably, the Convention did not "abrogate" the provisions of Rule 4(i) in that the treaty did not abolish, nullify or replace the methods of service described in the Rule. However, the Rules of Civil Procedure cannot be in conflict, or inconsistent with the "supreme law of the land," i.e. the Constitution, federal statutes and relevant treaties. Sibbach v. Wilson & Co., supra. When a treaty and a federal procedural rule relate to the same subject, the courts should endeavor to construe both the treaty and the rule so as to give effect to each without violating the language of the other. Should the language and effect

of the rule be totally unsalvageable in relation to similarly applicable provisions of a treaty, the federal procedural rule should be subordinated to the provisos of the treaty.

In the present case, Rule 4(i)(1)(E) of the Federal Rules of Civil Procedure provides for service "as directed by order of the court." Not only must such an order provide for actual notice in a manner consistent with the other subdivisions of Rule 4(i), but the prescribed method of service under such an order must comply with the terms of the Convention where applicable.

An order issued under Rule 4(i)(1)(E) cannot be construed as ushering a prospective defendant into federal court thereby extending in

personam federal jurisdiction into foreign countries, where jurisdiction had not previously existed, or in contravention of a treaty, the "supreme law of the land":

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." F.R.C.P. Rule 82.

Thus, the terms and methods of service described in an order issued under Rule 4(i)(1)(E) must comply with the provisions of the Convention as the "supreme law of the land." U.S. Const. Art. 6.

B. The Applicability of the Convention

The Court of Appeals for the Second Circuit asserts that, "It is undisputed that the Bahamas has never become a direct signatory to the

Convention." (A25)

On July 10, 1973, the Commonwealth of the Bahamas became independent from the United Kingdom of Great Britain. In an official letter dated July 10, 1973, from the Office of the Prime Minister of the Bahamas to the Secretary General of the United Nations, the Prime Minister expressed his continuing "desirability of maintaining existing legal relationships, and conscious of its [the Commonwealth of the Bahamas] obligations under international law to honour its treaty commitments acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of the Bahamas were succeeded to by the Commonwealth of the Bahamas upon Independence by virtue of customary international law." (Emphasis supplied)

(A119) The letter presumes that the Commonwealth of the Bahamas succeeded to "each treaty" entered into by the United Kingdom on behalf of its constituents, including the Bahamas, unless the treaty had previously lapsed "by virtue of customary international law":

> "It is desired that it be presumed that each treaty has been legally succeeded to by the Commonwealth of The Bahamas and that action be based on this presumption until a decision is reached that the treaty should be regarded as having lapsed. Should the Government of the Commonwealth of The Bahamas be of the opinion that it has legally succeeded to a treaty, and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof." (A120-21)

Although the Court of Appeals cites many unofficial sources (including the Memorandum to United States Marshalls

Concerning Instructions for Serving Foreign Judicial Documents in the United States and for Processing Requests by Litigants in This Country for Service of American Judicial Documents Abroad, Dep't. of Justice Memo No. 386, Revision 2, June 15, 1977) (A27), contending that the Convention does not apply to foreign service of United States documents in The Bahamas, there was no discussion of international law, or of whether the Commonwealth of The Bahamas gave notice of the termination or inapplicability of the Convention as provided in the above quoted letter, or any official citation from Bahamian sources as to the status of the Convention in the independent Commonwealth.

Under generally accepted principles of international law, until

express termination by the successor State, all treaties provisionally remain in effect:

> "2. When a successor State [the Commonwealth of The Bahamas] communicates to the third State [member nations of the United Nations, including the United States] a declaration expressing its consent to the provisional application of such treaties pending a decision with regard to their maintenance in force, modification or termination, the treaties shall continue to apply provisionally as between the successor State and the third State unless in the case of a particular treaty:
>
> "(a) The treaty comes into force automatically as between the States concerned under general international law independently of the declaration; or
>
> "(b) It appears from the treaty or is otherwise established that the application of the treaty in relation to successor State would be incompatible with its object and purpose; or
>
> "(c) Within three months of receiving the notification the third State in question has

informed the successor State of its objection to such provisional application of the treaty." Yearbook of the International Law Commission, Art. 4, subd. 2, "Unilateral Declaration By a Successor State," Vol. II (1969) (Emphasis supplied)

The official letter from the Office of the Prime Minister of the Commonwealth of the Bahamas (A119) is a unilateral declaration by the Commonwealth, as a "successor State" of the United Kingdom, to member nations of the United Nations, that each treaty, including the Convention signed by the United Kingdom, provisionally remains in effect unless it has previously lapsed, or express notice of termination is received from the Bahamian government.

Unquestionably, prior to independence, the Convention formed part of the laws of The Bahamas Islands as a

member of the United Kingdom, a direct signatory of the treaty. Subsequent to independence on July 10, 1973, until express declaration to the contrary, and an act of legislation by the Bahamian Parliament, the Convention provisionally formed a part of the laws of the independent Commonwealth of The Bahamas.*

* Under British commonwealth law, treaties remain in full force and effect until termination or alteration by an act of Parliament. And when a treaty affects existing domestic law, only an act of legislation (in this case Bahamian legislation) may alter or terminate the provisos of an international treaty entered into for the benefit of commonwealth nations, such as the Bahamas, by the United Kingdom: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations if they entail alteration of the existing domestic law requires legislative action." Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326 per Ld. Atkins Privy Council.

Moreover, as part of the laws of The Bahamas prior to independence, the Convention remained provisionally in effect thereafter under Section 4 of The Bahamas Independence Order 1973 which is an integral part of the Constitution of the Commonwealth of The Bahamas. The Independence Order provides that the laws existing prior to Bahamian independence are preserved and guaranteed continuity through and after independence until amended or annulled by Parliament of the Commonwealth of The Bahamas. (A122)

In writing the Court of Appeals decision, Medina, J., speaking for the Court, is unsure of the Convention's Bahamian legal status even after citing many unofficial U.S. sources,

and attempts to gloss over the issue in an obvious misapplication of case law to the present circumstances:

> "Moreover, there is much to be said in support of the view that, even if the terms of the Convention were applicable, the Convention was not intended to abrogate the methods of service prescribed by F.R.C.P. Rule 4." (A27)

There should be no question that service under Rule 4(i)(1)(E) must comply with treaties relating to the same subject matter. The Convention did not "abrogate" Rule 4, however, that is not to say that Rule 4 need not be construed within the terms of the Convention, especially where service is "as directed by order of the court" under subdivision "(E)." The Convention is the "supreme law of the land" to which federal procedural rules are subordinate.

The Court of Appeals surely

so far departed from the accepted and customary principles of international law and procedure as to call for an exercise of this Court's powers of supervision.

C. The Burden of Proving Service

As to any alternative arguments that the Petitioner never demonstrates that the service of process employed in the instant case does not meet the terms of the Convention, the burden of proof is misplaced. The Respondent-Plaintiff, seeking to invoke in personam federal jurisdiction over the Petitioner-Defendant, has the burden of establishing service of process in conformity with applicable law, rules and treaties, and has the obligation to come forward with

the facts. Amba Marketing Systems, Inc. v. Jobar Intern'l, Inc., 551 F.2d 784 (9th Cir. 1977). The party seeking to invoke the in personam jurisdiction of the federal court has the burden of proof, and the onus may not be shifted to the party challenging jurisdiction. Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974); Arcata Graphics Corp. v. Murrays Jewelers & Distributors, Inc., 384 F.Supp. 469 (S.D.N.Y. 1974).

CONCLUSION

For the reasons hereinabove stated, the Petitioner respectfully submits that a writ of certiorari

should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 159 & 323—August Term, 1978.

(Argued October 6, 1978 Decided January 24, 1979.)

Docket Nos. 78-7279 & 78-7092

INTERNATIONAL CONTROLS CORP.,

Plaintiff-Appellee,

—v.—

ROBERT L. VESCO,

Defendant-Appellant.

INTERNATIONAL CONTROLS CORP.,

Plaintiff-Appellee,

—v.—

ROBERT L. VESCO, HARRY L. SEARS, FRANK G. BEATTY, NORMAN LEBLANC, STANLEY GRAZE, MILTON F. MEISSNER, ULRICH J. STRICKLER, RICHARD E. CLAY, WILBERT J. SNIPES, FREDERIC J. WEYMAR, GILBERT R. J. STRAUB, C. HENRY BUHL III, RALPH P. DODD, ALWYN EISENHAUER, GEORGE PHILLIPE, JOEL GRADY, SHIRLEY BAILEY, VESCO & CO., INC., IOS LTD., COLUMBUS TRUST COMPANY, LIMITED, BAHAMAS COMMONWEALTH BANK, INTERNATIONAL BANCORP, KILMOREY INVESTMENTS LTD., VALUE CAPITAL LTD., GLOBAL HOLDINGS LTD., GLOBAL FINANCIAL LTD., BUTLERS BANK, LTD. (NOW KNOWN AS WHO HOLD-

INGS LTD.), ALLAN J. BUTLER, BANK CANTRADE LTD., FAIRFIELD AVIATION CORPORATION, FAIRFIELD GENERAL CORPORATION, SKYWAYS LEASING CORPORATION and MARINE MIDLAND BANK, NEW YORK,

Defendants,

ROBERT L. VESCO,

Defendant-Appellant.

Before:

MEDINA and MANSFIELD, *Circuit Judges,*
and WARD, *District Judge.**

Consolidated appeals from two orders of the District Court for the Southern District of New York, Judge Charles E. Stewart, Jr.

In these two consolidated appeals, Robert L. Vesco appeals from two orders denying: (1) a motion to vacate a default judgment entered against Vesco on October 5, 1973; and (2) a motion in an entirely different action to vacate another default judgment entered against Vesco on September 11, 1974. The orders in each of these two cases are affirmed, with costs. The opinions below have not been officially reported.

ROBERT D. FOGLIA, New York, N.Y., *for Defendant-Appellant.*

MILTON S. GOULD, New York, N.Y. (Daniel L. Carroll, Thomas J. Johnson and Shea Gould Climenko & Casey, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

* District Judge of the Southern District of New York, sitting by designation.

MEDINA, *Circuit Judge:*

We have before us two consolidated appeals by Robert L. Vesco. The first is from an order of Judge Charles E. Stewart, Jr., dated February 1, 1978, denying a motion pursuant to F.R.C.P. 60(b)(4) by Vesco, on certain papers and "on all the proceedings heretofore had herein" to vacate a default judgment entered against him on October 5, 1973. The second is from another order of Judge Stewart entered on May 3, 1978, denying a motion by Vesco in an entirely different action, also made "upon all of the proceedings heretofore had herein," to vacate a default judgment entered on September 11, 1974. We shall proceed with the first appeal, leaving the second until the end of this opinion. Judge Stewart's opinions in the two cases are not officially reported.

After probing and analyzing a considerable number of side issues, digressions and a morass of procedural detail raised in the briefs and on the oral argument of the appeals, we have concluded to affirm, as dispositive of the two appeals, Judge Stewart's findings that: (1) the service of the summons and complaint on Vesco on July 30, 1973 at his Brace Ridge Road residence in Nassau, Bahamas, gave the Court *in personam* jurisdiction over Vesco (73 Civ. 2518); and (2) the service of the summons and complaint on Vesco on April 17, 1974 in the separate action in the Southern District of New York (74 Civ. 1588) at the same Brace Ridge Road residence in Nassau, Bahamas, gave the Court *in personam* jurisdiction over Vesco. With regard to the attempted service of the amended complaint on October 24, 1973, referred to in Vesco's brief on the first of the two appeals, we also approve Judge Stewart's finding that this service did not give the Court *in personam* jurisdiction over Vesco. We do not reach Judge Stewart's ruling that

Vesco's motion to vacate the default judgment of October 5, 1973 was not timely made.

As this Vesco controversy will probably reach this Court again from time to time for some years to come, we think it may spare other judges the time and effort we have spent studying the briefs and the twelve large manila folders in the Clerk's Office containing the "proceedings heretofore had herein," and constituting the original record in Appeal 78-7092, if we make a preliminary statement describing the salient features of the prior proceedings and especially the prior opinions filed by various panels of this Court. This we think is especially important as it will serve to place the matters dispositive of these appeals in their proper relation to what has already been decided and what has not already been decided.

Part One

Prior History of the Case.

For some years prior to 1972 the SEC took note of the conduct of Vesco and his manipulation of corporate entities, spin-offs, the shuffling about of individual officers and directors and the use of foreign banks as depositaries of the alleged hundreds of millions of dollars he is said to have misappropriated from investors in violation of the federal securities laws. The result of the ensuing investigation was that on November 27, 1972 the Commission filed a suit against Vesco, 20 other individuals and 21 corporate entities in which the complaint, based upon a vast array of alleged wrongdoing by Vesco and his associates, prayed for extensive legal and equitable relief. This action in the District Court for the Southern District of New York is entitled *Securities and Exchange Commission* v. *Robert L. Vesco*, No. 72 Civ. 5001.[1] The complaint in this action alleged "a scheme of extraordinary magnitude, deviousness and ingenuity in violation of the anti-fraud provisions of the Securities and Exchange Act of 1934 * * * masterminded by Vesco." One of the defendants was International Controls Corp., alleged to be a principal vehicle used by Vesco to implement various features of the scheme to defraud investors. On March 16, 1973 ICC consented to the entry of final judgment against it in the SEC action, and Judge Stewart, in lieu of the appointment of a receiver sought by the SEC, appointed a Special Counsel and a new interim board of directors to represent ICC.

David M. Butowsky, the Special Counsel appointed by the Court as authorized by the terms of the consent judgment, on June 7, 1973 filed in the District Court for the Southern District of New York the complaint in the action in which we have the first of the two consolidated appeals (78-7092). In this action plaintiff ICC sued 32 individual and corporate defendants, 22 of whom were defendants in the already pending SEC action (72 Civ.

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1 *Securities and Exchange Commission* v. *Robert L. Vesco, Norman LeBlanc, Milton F. Meissner, Ulrich J. Strickler, Stanley Craze, Frank G. Beatty, Richard E. Clay, Wilbert J. Snipes, James Roosevelt, Frederic J. Weymar, Gilbert R. J. Straub, C. Henry Buhl, III, Allan C. Butler, Lawrence B. Richardson, John D. Schuyler, Edward Stoltenberg, Howard F. Cerny, Georges Phillipe, Allan F. Conwill, Raymond W. Merritt, John S. D'Alimonte, IOS Ltd., International Controls Corp., Bahamas Commonwealth Bank, Ltd., Overseas Development Bank Luxembourg S.A., International Bancorp Ltd., Value Capital Ltd., Butlers Bank Ltd., Transglobal Financial Services Ltd., Kilmorey Investments Ltd., Global Holdings Ltd., Global Financial Ltd., I.I.T. Management Co., S.A., F.O.F. Management Co., Ltd., Venture Management Co., Ltd., Transglobal Growth Fund Management Co., Ltd., Bank Cantrade, Ltd., Venture Fund (International), N.V., Fund of Funds, Ltd., Transglobal Growth Fund, Ltd., IIT, An International Investment Trust, Consulentia Verwaltungs, A.G.*, No. 72 Civ. 5001 (S.D.N.Y. Filed November 27, 1972).

5001) and 10 of whom were not. These new defendants included Vesco & Co., Inc. and various corporations connected in one way or another with a Boeing 707 aircraft purchased for $1,375,000 and refurbished by an expenditure of $600,000 to $700,000 "for the personal comforts, conveniences and zest for living" of Vesco and with the yacht Patricia III, located in Miami, Florida, to be fitted up at great expense to suit Vesco's "Sybaritic tastes." On June 20, 1973, Vesco, Patricia Vesco, his wife, and Vesco's family boarded the yacht, and Vesco and his family remained its sole users until shortly before it was put into Miami for repairs.

The first phase of this case (*International Controls Corp.* v. *Vesco,* 73 Civ. 2518 (S.D.N.Y.)[2] to reach this Court was an appeal from an order of Judge Stewart granting a preliminary injunction, among other things enjoining the control or disposition of certain assets, including the Boeing 707 and the yacht Patricia III. This is Appeal No. 1. The opinion affirming Judge Stewart's injunction, with a certain modification, was written by Chief Judge Kaufman, for a panel consisting of himself, Judge Mansfield and Judge Mulligan, the latter of whom dissented in part. This Appeal No. 1 was argued on December 10, 1973, decided on January 15, 1974, and it is reported as *International Controls Corp.* v. *Vesco,* 490 F.2d 1334 (2d Cir.), *cert. denied,* 417 U.S. 932 (1974).

The part of that opinion pertinent to these two present consolidated appeals states that Vesco was not one of the appellants but Vesco & Co., Inc. was one of the appellants. The default judgment of October 5, 1973 is mentioned (490 F.2d at page 1350); also that Vesco & Co., Inc. was incorporated by Vesco on July 12, 1972 as an estate planning

2 *See* the title page of this opinion.

device, all the voting common stock of which is owned by Patricia Vesco as custodian for Vesco's children, and the officers are Mrs. Vesco and Shirley Bailey, Vesco's personal secretary (490 F.2d at page 1349). Judge Stewart, in the findings upon which the preliminary injunction was based, stated that "Vesco & Co. is a corporate alter ego for defendant Robert Vesco and was created by him during and after the perpetration of the fraud charged in the complaint." This is the finding referred to in Chief Judge Kaufman's opinion (490 F.2d at page 1350). Because of the relevance of this alter ego finding to the disposition of the two appeals now before us, however, we think it proper to state that, at a later date and on August 22, 1975, in connection with a different application in this same action, Judge Stewart repeated this finding. We shall find that an appeal was taken to this Court and the upshot was that the finding was not reversed or modified and that it stands now as the law of this case for all purposes. We shall discuss this particular matter later in some detail.

For our present purposes this opinion in Appeal No. 1 by Chief Judge Kaufman, made as above stated on the appeal from the order of Judge Stewart granting the preliminary injunction, also refers to the fact that Vesco had already absented himself from the territorial limits of the United States, had refused to return and was "safely ensconced in Nassau, the Bahamian capital" (490 F.2d at page 1338). The order to show cause, on which this motion for the preliminary injunction was made, is dated June 8, 1973.

After the affirmance of the order of Judge Stewart granting the preliminary injunction, Special Counsel for plaintiff proceeded with the utmost diligence to try to reach assets to satisfy the default judgment, which did

not provide for the payment of any specific sum as the damages had not yet been proved. This led to extended and time-consuming hearings which resulted in a finding of "specified damages of $2,433,466.72, but left open the possibility that ICC might be able to prove further damages in subsequent proceedings." A second default judgment in this amount was entered against Vesco on July 16, 1974. All this time, quite obviously aware of the allegations in the complaint in this action and of all the proceedings above referred to, Vesco was sitting in the wings leaving it to his alter ego to do the appealing and the presentation to this Court of the reasons for reversal of some or all of Judge Stewart's rulings. One of these arguments asserted by Vesco & Co., Inc. was that because of the alleged defective service of process the judgment against Vesco was void. And this is precisely the principal question asserted by Vesco in the first of these two consolidated appeals now before us for decision. As he had not directly submitted to the personal jurisdiction of the court, Judge Stewart in the hearings above referred to properly refused to permit Vesco & Co., Inc. to assert or prove defenses personal to Vesco. At this point it is well to remember that the complaint alleges the facts from which the alter ego relationship is to be inferred and Vesco by his default has placed none of the allegations of the complaint in issue.

On May 20, 1975 ICC moved before Judge Stewart for an order of execution to reach the assets of Vesco & Co., Inc. to satisfy the default judgment against Vesco. On August 22, 1975 Judge Stewart ruled that Vesco & Co., Inc. was the alter ego of Vesco and directed both Vesco and Vesco & Co., Inc. to turn over their ICC stock to a receiver. Vesco & Co., Inc. took an appeal from this de-

cision to our Court. The resulting opinion is reported as *International Controls Corp.* v. *Vesco*, 535 F.2d 742 (2d Cir. 1976), *cert. denied*, 429 U.S. 1088 (1977). This Appeal No. 2 came on for argument before a different panel consisting of Judges Kaufman, Smith and Anderson. The appeal was argued on March 8, 1976 and decided on May 13, 1976. The Court, in an opinion by Judge Smith, did not decide the merits or any part thereof. Instead, its attention was diverted by counsel for Vesco & Co., Inc. to the interesting questions of finality and compliance with Rule 54(b). Since the judgment appealed from was against Vesco and not the other defendants, it was held that further damages might be proved later; and, as the complaint contained multiple claims, this Court stated that it could not discern with the clarity required by the final judgment rule just how much of the judgment was final and how much was not. The Court was also unsure as to whether the single Section 54(b) certification was intended to apply not only to the first default judgment but also to the second. Accordingly, on May 13, 1976, the case was remanded to Judge Stewart. While the opinion makes no reference to Vesco, the fact is that extradition to face the three indictments described in footnote 1 to Chief Judge Kaufman's opinion on Appeal No. 1 had been refused and Vesco was still at large and eluding process servers as will more fully appear later in this opinion.

However disheartening the further delay caused by this remand might have seemed to Special Counsel for appellee, he took immediate steps to remedy the procedural defects that had been brought to the attention of the Court by counsel for Vesco & Co., Inc. So, upon proper notice to Vesco & Co., Inc. and to Vesco by order to show cause dated May 21, 1976, and on May 27, 1976, despite urgent and prolonged arguments on behalf of Vesco & Co., Inc.

for further hearings and further delay, Judge Stewart prepared and signed a new and amended judgment entered May 27, 1976, in which the part of the claims asserted in the complaint that was covered by the judgment and the part of the claims asserted in the complaint that was not covered by the judgment were made unmistakably clear. He also certified, in compliance with the requirements of Rule 54(b), that as to the amended judgment thus defined "there is no just reason for delay in entering a final judgment."

This led to a fantastic series of events and a new spate of procedural smoke screens by Vesco & Co., Inc. which, whether so intended or not, resulted in further delays in bringing Vesco to justice.

Vesco & Co., Inc. appealed to this Court from the amended judgment, entered on May 27, 1976 on the remand. But this notice of appeal was served on July 7, 1976, nine days too late. The flimsy excuses for this "mistake" are exposed in Judge Stewart's opinion of October 27, 1976. On August 4, 1976 appellee moved in this Court to dismiss the appeal; on August 31 Vesco & Co., Inc. moved in the District Court, pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure for an extension of time within which to file a notice of appeal, which was denied. On September 14, 1976 this Court heard appellee's motion to dismiss and a cross-motion by Vesco & Co., Inc. for reconsideration of the remand. On the same day, by order of Judges Anderson, Mansfield and Mulligan, the motion for reconsideration was denied and the motion to dismiss was granted "for lack of jurisdiction."

Accordingly, as no effective appeal was taken by Vesco & Co., Inc. from the order of Judge Stewart holding that Vesco & Co., Inc. was the alter ego of Vesco, that ruling is now the law of this case. Moreover, it is the key to

reaching the assets of Vesco, who, for all these years has by one means or another frustrated every attempt to bring him back to the United States and cause him to disgorge the avails of his misconduct, including the huge sums said to be deposited in secret accounts in banks in Switzerland, Liechtenstein and elsewhere.

In any event, as of September 14, 1976 it appeared that Special Counsel for appellee might then be able to get at Vesco's assets in Vesco & Co., Inc. But Vesco merely shifted lawyers and tried something entirely new. This was a motion in the District Court to vacate the May 27, 1976 judgment pursuant to Rule 60(b) of the F.R.C.P.

The main thrust of the motion was for the first time to bring before the Court the fact that the judgment of October 5, 1973 was plainly based on the original complaint and, so the argument of Vesco & Co., Inc. went, the mere filing of an amended complaint on September 7, 1973, before the entry of the default judgment of October 5, 1973, superseded the original complaint and made the default judgment void [Rule 60(b)(4)]. Judge Stewart's reason for denying this motion on October 27, 1976 was that the mere filing of an amended complaint does not supersede the original complaint, and that until proper service of an amended complaint has been made pursuant to Rule 5(a) the original complaint remains in full force and effect. He further held that the only attempted service of the amended complaint on Vesco was at his Brace Ridge Road residence in Nassau, Bahamas, on October 24, 1973, and that this service was invalid and ineffective because not made in compliance with his order authorizing the service. Accordingly, as this service gave the Court no *in personam* jurisdiction over Vesco, the amended complaint did not supersede the original complaint and the motion under F.R.C.P. Rule 60(b)(4) to vacate the default judgment of October 5, 1973 against

Vesco was denied on October 27, 1976. Thus, in connection with the first of the two consolidated appeals, and to be sure that we leave no loose ends, we feel that we should discuss in a later part of this opinion the details concerning this attempted service and our reasons for approving Judge Stewart's ruling that the service was improperly made and ineffective to give the Court *in personam* jurisdiction over Vesco.

This brings us to the third time this case has come before our Court. Appeal No. 3 by Vesco & Co., Inc. was from Judge Stewart's order of October 27, 1976. On June 3, 1977 the order was affirmed, in an opinion by Judge Oakes, in which Judge Wyzanski, Senior Judge of the District Court for the District of Massachusetts, sitting by designation, and Judge Holden, Chief Judge of the District Court for the District of Vermont, also sitting by designation, concurred. The case is reported as *International Controls Corp.* v. *Vesco*, 556 F.2d 665 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

In the opening paragraph of the opinion Judge Oakes commented (556 F.2d at page 667):

> While those transactions are not before us in the instant appeal, it was Mr. Vesco's "multifarious manipulations" that led him to absent himself from this country and to be unavailable for service of process. This persistent refusal to appear in any American court is the single most important contributing cause to the procedural problems that have culminated in this appeal • • • .

To return to the procedural claim then asserted by Vesco, counsel had a serious problem. This problem, as will appear more clearly when we come to discuss the merits in connection with our disposition of the first of the two con-

solidated appeals, was that a holding that the service of the amended complaint on Vesco on October 24, 1973 was *valid* would be inconsistent with and greatly weaken the argument now pressed upon us by Vesco that the service of the original complaint on him on July 30, 1973 was *not valid*. So, true to form, counsel for Vesco & Co., Inc. on Appeal No. 3 so presented his argument for reversal as to concentrate on the claim that the mere filing of the amended complaint on September 7, 1973 superseded the original complaint so there was no basis on which the default judgment could rest and it must, therefore, be vacated. And the way Judge Stewart's ruling that the service on Vesco of the amended complaint on October 24, 1973 was *invalid* was pushed into the background was by the simple expedient of making no attack, on Appeal No. 3, on this ruling. This turns out to be just another of Vesco's maneuvers as he now, in the first of the appeals before us (Vesco's Main Brief, in 78-7092, at pp. 19ff), challenges as erroneous Judge Stewart's finding that the October 24, 1973 service was *invalid*, whereas in Appeal No. 3 this finding was not challenged by Vesco & Co., Inc.

It is interesting to note that the failure to challenge the finding of invalidity of service on Vesco on Appeal No. 3 did not escape the vigilance of Judge Oakes, who commented at 556 F.2d at page 668: "The District Court found that the amended complaint was not properly served on Vesco, a finding not challenged by appellant here."

The net result was that the finding of invalidity of the service of the amended complaint on Vesco on October 24, 1973 was affirmed. By failing to challenge this finding the Court was given the impression that the ruling was correct. This deliberate and purposeful act of Vesco & Co., Inc., the alter ego of Vesco, estops Vesco from claiming, on the first of the two consolidated appeals now before us, that the

ruling of Judge Stewart was erroneous. This is especially true in view of all that has occurred in the interval between the failure to challenge the finding on Appeal No. 3 from Judge Stewart's order of October 27, 1976 and the assertion that the finding was erroneous now made in Vesco's main brief herein on September 1, 1978. Moreover, as stated *infra* at p. 28f, we are of the opinion that Judge Stewart's ruling that the service on Vesco on October 24, 1973 was invalid is correct because the service was not made in accordance with the terms of Judge Stewart's order authorizing the service of the amended complaint.

There is another aspect of the opinion of Judge Oakes on Appeal No. 3 that might lead to some misunderstanding. As urged on by counsel for Vesco & Co., Inc., Judge Oakes commented with reference to the disposition by this Court of Appeal No. 2, 556 F.2d at page 667: "The court did not reach the question of the validity of the alter ego ruling." This is literally true. But the reason it is true is that this Court remanded the case as we have previously stated, and this was done without reaching *any* of the questions raised by appellant Vesco & Co., Inc. As a matter of fact and law this alter ego ruling was a repetition of the ruling made on Appeal No. 1 as stated in Chief Judge Kaufman's opinion above referred to; and the second ruling to the same effect by Judge Stewart became final, as above stated, when counsel for Vesco & Co., Inc. filed its notice of appeal from the order as amended on the ninth and nine days too late and the appeal was dismissed.

After all this litigation over a period of five years one might surmise that the Special Counsel was at last in a position to close in on some of Vesco's assets. Nothing could be further from the fact. During this period of five years and despite the utmost diligence of the Special Counsel, the courts, and especially this Court, have been busy

wrestling with Vesco's procedural maneuvers. Except for the alter ego finding in Chief Judge Kaufman's opinion on Appeal No. 1, and repeated from time to time as we have said, progress has been delayed and obstructed by Vesco's procedural maneuvers. Nevertheless, it now appears that, during all these years, Vesco has had a card up his sleeve and that is his claim that the service of the summons and complaint upon him at his Brace Ridge Road residence in Nassau, Bahamas on July 30, 1973 was not good service. He had "talked" about this off and on, and Vesco & Co., Inc. had mentioned this claim in one way or another on some of its various appeals but the question had never been squarely decided.

And so, on July 29, 1977 Vesco at last moved to vacate the default judgment rendered against him on October 5, 1973, pursuant to Rule 60(b)(4) on the ground that the judgment was void because the service, made almost to the day five full years before, was not properly made and the court had no *in personam* jurisdiction of Vesco. This is the subject of the first appeal before us now.

The situation is incongruous, to say the least. Here we have a man who has "masterminded" the whole alleged scheme to defraud investors, who is familiar with every phase of the prolonged effort to defeat justice by absenting himself from the territorial limits of the United States, by avoiding extradition, by evading process servers and by engineering various appeals to this Court, all with full knowledge of the contents of the complaint which charges him as the principal defrauder, and he comes before the Court and asserts the claim that the service was invalid because he was not given fair notice of the charge. Thus there is much to be said in support of Judge Stewart's finding that the motion, under all the circumstances, was untimely made. Nevertheless, we have decided not to reach

that point but rather to decide on the merits whether or not the service was valid.

Part Two

The Service by Miss Yohonn at Vesco's Brace Ridge Road Residence in Nassau on July 30, 1973 Was Good and Effective Service and Gave the Court In Personam Jurisdiction over Vesco.

A.

Discussion of Law Authorizing Judge Stewart's Orders of July 27, 1973 and July 29, 1973.

The service of the summons and complaint on July 30, 1973, was pursuant to the terms of an order by Judge Stewart on July 29, 1973 authorizing Lois S. Yohonn, a lawyer employed in the office of plaintiff's attorneys of record in New York,[3] to deposit "a copy of the summons and complaint upon the premises of the last known residence of said defendant located in Nassau, Bahamas, and

3 Vesco claims that the appointment of an associate of plaintiff's law firm was improper, citing a 1939 opinion by District Judge Hulbert in *In re Evanishyn*, 1 F.R.D. 202 (S.D.N.Y. 1939). We think *Evanishyn* was wrongly decided and we refuse to follow it. The Advisory Committee's Note of 1963 to Rule 4(i) states that allowing "any person who is not a party" to effect service authorized by a court order "increases the possibility that the plaintiff will be able to find a process server who can proceed unimpeded in the foreign country * * *." Service by Bahamian counsel proved absolutely futile in this case, and no doubt the same would have been true if the aid of a local official had been solicited. The person selected had the requisite information at her disposal as to both Vesco's whereabouts and the ancillary order for service and was knowledgeable about the business of serving process. We believe that so long as the court does not appoint the actual party to effect service under Rule 4(i)(1)(E), the selection of the person believed to be in the best position to effect service of process is a matter of discretion. Certainly there was no abuse of discretion by Judge Stewart here.

mailing a copy of the summons and complaint to said defendant at the address of such last known residence in Nassau, Bahamas."[4] The reason for the order, and another order to which we shall refer later, was that from the SEC proceedings mentioned in the preliminary part of this opinion Vesco was known to be not averse to evading the service of process. Thus actual delivery of the summons and complaint to Vesco in person was not required. As will later appear, two bodyguards stationed at Vesco's residence made any delivery of process to Vesco in person impossible. We shall devote this part of the opinion to a brief discussion of the provisions of law that make it proper for Judge Stewart to have made this order of July 29, 1973.

As we are dealing here with service of process in a foreign country, we must, in our consideration of the matter, start with F.R.C.P. Rule 4(f) "Territorial Limits of Effective Service." This subdivision provides *inter alia* for service "when authorized by a statute of the United States." This statute is Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, which is the same statute on which the subject matter jurisdiction[5] of the District Court in

4 Vesco claims that registered mail with a return receipt requested was required. We disagree. The views expressed by Judge Weinfeld in an analogous case, *Levin* v. *Ruby Trading Corp.*, 248 F.Supp. 537 (S.D.N.Y. 1965), are applicable. Where, as here, mailing is coupled with leaving the summons and complaint at a place where the defendant is reasonably likely to learn of their contents, and where the defendant has a long history of avoiding process servers, due process is accorded without the use of a return receipt.

5 The complaint here alleged complex schemes involving multiple corporate manipulations in violation of Section 10(b) of the 1934 Act, 15 U.S.C. §78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5. Our Court resolved the question of subject matter jurisdiction in Appeal No. 1, *International Controls Corporation* v. *Vesco*, 490 F.2d 1334, 1342-1346, 1350-1351 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974).

(footnote continued on next page)

this case is based. But, while Section 27 authorizes service "wherever the defendant may be found," it does not explicitly authorize service outside the territorial limits of the United States. This gap was bridged by this Court in an opinion by Judge Friendly in *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972), interpreting Section 27 as authorizing international service of process.[6]

The next step in our reasoning, leading up to Judge Stewart's orders authorizing service, is F.R.C.P. Rule 4(e), which provides with reference to extraterritorial service that service may be made in the manner authorized by the

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Vesco further argues that the District Court lacked subject matter jurisdiction because the partial inquests held pursuant to the default judgment focused on damages related to common law claims rather than solely to claims arising under the Securities Laws. *Appellant's Brief*, at pp. 23-27. This is, in reality, a restatement of the argument made by Vesco & Co., Inc., in Appeal No. 1, namely that the facts pleaded in the complaint state claims, if at all, arising under state law and not the Securities Laws. Chief Judge Kaufman met this argument in his opinion for our Court in Appeal No. 1 at the pages noted above.

Assuming that the partial inquests referred in part to damages arising under state law claims, principles of pendent jurisdiction allowed the District Court to consider these damages once a claim arising under Section 27 was established. Recent authority holds this to be the case even where, as here, extraterritorial service has been made pursuant to a federal statute. *Oetiker* v. *Jurid Werke, G.m.b.H.*, 556 F.2d 1 (D.C. Cir. 1977); *Robinson* v. *Penn Central Co.*, 484 F.2d 553 (3rd Cir. 1973); *Travis* v. *Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973); *Schwartz* v. *Eaton*, 264 F.2d 195 (2d Cir. 1959) (Dictum); Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 Colum. L. Rev. 423 (1970); Note, 63 Colum. L. Rev. 762 (1963); Note, 73 Harv. L. Rev. 1164 (1960). *See also* 2 *Moore's Federal Practice* ¶4.42[1], at 4-524 n.47 (1978); 4 Wright & Miller, *Federal Practice and Procedure*, §1125, at 527 (1969). We believe these authorities better reasoned than earlier cases, collected in *Moore's Federal Practice* and *Wright & Miller*, holding to the contrary.

6 *See also* 2 *Moore's Federal Practice* ¶4.42[1], at 4-521, ¶4.45, at 4-563, and cases cited.

statute (i.e. Section 27), or, "if there is no provision therein prescribing the manner of service," then service is to be made "in a manner stated in this rule." As Section 27 does not, with reference to extraterritorial service, prescribe "the manner of service," this brings us to the "manner stated in" other relevant parts of F.R.C.P. Rule 4. Thus, in addition to the standard methods of service set out in Rule 4(d), we find that Rule 4(i) "Alternative Provisions for Service in a Foreign County" comes into play. Rule 4(i) authorizes the use of five alternative forms of substitute service which provide the plaintiff and the court with the flexibility required to effect service on a defendant in a foreign country.[7] Subparagraph (E) of Rule 4(i)(1) provides for service "as directed by order of the court," and in this section we find the specific authority on which Judge Stewart relied when he signed the orders authorizing service on Vesco.

Rule 4(i)(1)(E) permits the district court "by order to tailor the manner of service to fit the necessities of a particular case."[8] The district court is not limited to those methods for service set out in Rules 4(d) and 4(i)(1)(A) through (D), but is authorized to fashion a method of service, under Subparagraph (E), to satisfy the requirements of the case at hand and of the Due Process Clause. The Supreme Court has long recognized that no one form of substitute service is favored over any other so long as the method chosen is reasonably calculated, under the

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7 *Advisory Committee's Note of 1963 to Rule 4(i). See also United States* v. *Danenza*, 528 F.2d 390 (2d Cir. 1975); *Levin* v. *Ruby Trading Corp.*, 248 F.Supp. 537 (S.D.N.Y. 1965); 2 *Moore's Federal Practice* ¶4.45, at 4-566; 4 *Wright & Miller* §1133, at 558-559; Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 Harv. L. Rev. 601, 636 (1964).

8 *Advisory Committee's Note of 1963 to Rule 4(i)(1)(E). See also* 4 *Wright & Miller* §1134, at 564-565.

circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit and an opportunity to present his defense.[9] The constitutional determination is derived from the necessities of each case rather than from a preconceived notion of what will provide actual notice in every case.

Thus we think Judge Stewart's order of July 29, 1973 was clearly authorized by law. That it was designed to give proper notice to Vesco and to comply with the requirements of due process are the only inferences compatible with the circumstances of this particular case that can be made from the recital of what occurred in Nassau in the months of June and July, 1973, and especially the service first attempted by Miss Yohonn on July 30, 1973, and the service later consummated by her on that same day, to which we shall now turn.

B.

The Service of the Summons and Complaint on Vesco, July 30, 1973.

International Controls Corporation filed its complaint in this action against Vesco and other defendants on June 7, 1973. Service was first attempted on Vesco by Bahamian counsel, authorized by an order of Judge Stewart dated June 15, 1973.[10] For unstated reasons Bahamian counsel were not able to effect service. Thus, in July 1973, counsel for ICC applied to Judge Stewart for an order permitting Lois S. Yohonn, one of his associates, to serve Vesco in Nassau, Bahamas. On July 27, 1973 Judge Stewart signed an order granting this request without detailing the method by which service was to be made.[11] ICC anticipated further difficulty in serving Vesco and therefore prepared at this time an ancillary order which Judge Stewart ultimately signed on July 29, 1973, permitting service by leaving the summons and complaint at Vesco's last known residence in the Bahamas and then mailing a copy of the papers to that address.[12]

Miss Yohonn proceeded to Nassau on Saturday, July 28, 1973. Contrary to Vesco's claim that she never attempted personal service, she spent the afternoon and evening of Sunday, July 29, and most of Monday, July 30, searching for Vesco at various locations in Nassau and Paradise Island. Unsuccessful in these efforts, Miss Yohonn drove herself to the Brace Ridge Road residence.

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9 *Hanson* v. *Denckla*, 357 U.S. 235 (1958); *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken* v. *Meyer*, 311 U.S. 457 (1940).

10 *See* the District Court Docket Entry for June 15, 1973, appearing at page iv of the Appendix of Defendant-Appellant Robert L. Vesco. This was referred to in the Affidavit of Leonard C. Gordon, sworn to on July 27, 1973, submitted in support of his request that Miss Yohonn be appointed to serve Vesco in the Bahamas.

11 The order of July 27, 1973 stated in part:

"* * * it appearing that Lois S. Yohonn is a qualified person over twenty one years of age and is not a party to this action, and that speed is essential in the service of the summons and complaint and that there will therefore be a saving in fees if service is made by said person, it is hereby

ORDERED, that Lois S. Yohonn be and she hereby is authorized to effect service of process in the within action on defendant Robert L. Vesco."

12 The order of July 29, 1973 duplicated the order set out above, adding the following:

"* * *, and it is further

"ORDERED that, service of process upon said defendant Robert L. Vesco may be effected by depositing a copy of the summons and complaint herein upon the premises of the last known residence of said defendant located in Nassau, Bahamas, and mailing a copy of the summons and complaint herein to said defendant at the address of such last known residence in Nassau, Bahamas."

There she found a bolted gate and two men who appeared to be bodyguards. One of them inquired as to her business. She asked if this was Vesco's residence. After some evasion one of the two men said it was his residence. Miss Yohonn represented that she was a friend of Vesco's and wished to speak with him. One of the guards left to go into the house and said he would make inquiry.

While the one guard was in the house two events of particular importance occurred. A car drove up to the gate and was admitted. Inside, according to Miss Yohonn on information and belief, were Mrs. Vesco and two children. Later, a boy of approximately 16 years came out of the house and, approaching the gate, stated to Miss Yohonn, "My father said to ask what you want." Miss Yohonn responded that she wished to serve a summons and complaint and threw the papers at the boy. The boy threw them back and returned into the house.

In the meantime the first guard had returned. When Miss Yohonn attempted to serve one of the guards, the response was: "You get out of here. We don't want no papers on this property. Don't you put anything on this property." They then threw the papers onto the road.

Miss Yohonn ran back to her car, afraid of the guards, and drove to her hotel. There she telephoned Judge Stewart, who authorized her to effect service according to the terms of the ancillary order signed on the previous day.[13]

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13 It is interesting to note that, while counsel for Vesco made a showing of skepticism at oral argument with respect to the signing of the second order and Miss Yohonr's telephone communication with Judge Stewart, during oral argument before Judge Stewart on December 20, 1977 Vesco's present counsel authorized a change on the face of Vesco's undated affidavit acknowledging that Miss Yohonn telephoned Judge Stewart's chambers in the afternoon or early evening of July 30, 1973, rather than in the morning of that day, to ask permission to use the alternative method of service.

Miss Yohonn hired a taxi for the second trip to Vesco's residence. There she threw a copy of the summons and complaint folded and tied with a blue ribbon over the fence and photographed the papers as they remained on the lawn in front of the house. The two guards immediately ran out to the gate, one armed with a stick and the other with a piece of pipe. One pulled open the door of the car and demanded that Miss Yohonn come out. The cab driver remonstrated with the guards and told them they could do nothing to Miss Yohonn while she was in his cab. When she told the guard that he had no right to touch the cab, he replied that she had no right to put anything on the property. Then the driver began to drive away.

After they had driven a short distance the driver informed Miss Yohonn that the guards were following them in a car. Fearing for her safety, Miss Yohonn directed the driver to proceed to a different hotel that was connected with her hotel by a series of corridors. She asked that the driver keep secret her whereabouts and returned to her hotel by a circuitous route, where she put the film in a safe deposit box. She arrived at her room at approximately 7:00 P.M. and remained there for some time during which the phone rang on several occasions, each time with no one on the other end. Miss Yohonn returned to New York on the following day, July 31, 1973.

On August 1, 1973 Miss Yohonn mailed a copy of the summons and complaint to Vesco at his Brace Ridge Road residence by ordinary first-class mail.

We think it quite clear and we hold and decide that the service of the summons and complaint at the Brace Ridge Road residence on July 30, 1973 was reasonably calculated to give Vesco actual notice of the lawsuit. Indeed, there is substantial and persuasive circumstantial proof

that, during the entire episode, Vesco himself was physically present in the house and witnessed the entire affair. The very presence of the body guards indicates this. And the boy's statement, "My father said to ask what you want," is most significant. And there is more.

Vesco's motion papers, on the motion to vacate the default judgment of October 5, 1973 were served on July 29, 1977. One of the mysterious and singular features of this remarkable case is an undated "affidavit" by Vesco filed in support of the motion on November 17, 1977. This "affidavit" contains 9 pages of rambling and disconnected statements having little relevance to what occurred at the Brace Ridge Road residence on July 30, 1973. He does not deny that the 16 year old boy was his son; he does not deny that the woman and children who drove up in the car were his wife and family; he does not deny that he asked anyone to inquire of Miss Yohonn what she wanted; and, most important of all, he does not deny that he was right there in the house all the time. He does not even deny that he hired the bodyguards to ward off process servers.

When inquiry was made of his lawyer on the oral argument of the appeals, he gave no explanation and did not answer. Instead, he asserted Vesco's attorney-client privilege.

C.

The International Convention on Service of Process Is Not Applicable Here as the Bahamas Never Agreed to It.

A new point not raised by Vesco when the matter was before Judge Stewart is that the service as made on Vesco on July 30, 1973 was not in accordance with the requirements of a treaty entered into by the United States in 1969

and described as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague, November 15, 1965, [1969] 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (Entered into force February 10, 1969). One difficulty with this argument is that the treaty cannot have any application to this case unless the Bahamas agreed to it, and the fact appears to be that it did not.

It is undisputed that the Bahamas has never become a direct signatory to the Convention. This leaves the question of whether it ever became a party through the United Kingdom, which was empowered by Article 29 of the Convention to declare, at the time of its signature or at any time thereafter, that the Convention should "extend to all the territories for the international relations of which it is responsible, or to one or more of them."

Vesco's brief quotes a letter from the Prime Minister of the Bahamas that merely indicates that the Bahamas became an independent state on July 10, 1973 and that many treaty rights and obligations of the Government of the United Kingdom in respect to the Bahamas were succeeded to by the Commonwealth of the Bahamas and others were not. 1978 T.I.F. 10. In letters dated May 14 and May 15, 1970, the British Ambassador to The Hague informed the Ministry of Foreign Affairs of the Netherlands of the intention of the United Kingdom to extend the Convention to various territories effective July 19, 1970. The

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14 *See* Letter from the Netherlands Ambassador to the United States to Secretary of State William Rogers (July 2, 1970). This letter referred to the letters of May 14 and 15, 1970 by which the United Kingdom extended the Convention to numerous territories. The letter of May 14 extended the Convention to Hong Kong. The letter of May 15 extended the Convention to Antigua, Bermuda, British Honduras, British Virgin Islands, British Solomon Islands Protectorate, Cayman Islands, Central and Southern Line Islands, Falkland Islands and

Bahamas was not included among these territories."[14] Thus it appears that the United Kingdom never extended the Convention to the Bahamas.

On the oral argument, counsel for Vesco was presented with the 1978 list of Treaties in Force, issued annually by the Office of the Legal Adviser, Department of State, which states that the treaty was extended[15] through Great Britain to the following:

dependencies, Fiji Islands, Gibraltar, Gilbert and Ellice Islands Colony, Guernsey, Jersey, Isle of Man, Montserrat, Pitcairn, St. Helena and dependencies, St. Lucia, St. Vincent, Seychelles, Turks and Caicos Islands.

15 The discrepancy between the territories listed in the letters of May 14 and 15, 1970 and those listed in 1978 Treaties in Force results from the manner in which Treaties in Force is compiled. The letters represent an accurate list of the territories to which the United Kingdom in fact extended the Convention. Treaties in Force sets forth a list of countries and territories to which the Convention actually applies, current through to the date of publication.

While Treaties in Force states that the United Kingdom "extended" the Convention to the territories listed in the text, that list is not inclusive since the compilers have deleted references to territories which have become independent since the time the Convention was extended to them and which have not succeeded to the Convention. For example, Fiji and the Seychelles Islands were referred to in the letter of May 15, 1970 but are not included in Treaties in Force. Fiji became independent on October 10, 1970; the Seychelles Islands became independent on June 28, 1976. Neither Fiji nor the Seychelles Islands have succeeded to the Convention, and thus the Convention is not in effect there. Nevertheless, the Convention did apply there prior to their independence.

Furthermore, Treaties in Force does not indicate instances where British colonies have changed their names. For example, the British Honduras changed its name to Belize on June 1, 1973. Belize has remained a British Colony, and thus the Convention is currently in effect there. This explains why only the British Honduras is mentioned in the letter of May 15, 1970 and why only Belize is mentioned in Treaties in Force.

The case of the Gilbert and Ellice Islands Colony involves both changes of names and subsequent independence. On October 1, 1975 the Ellice Islands separated from the Colony and changed their name to Tuvalu. The remaining islands of the Colony were renamed the Gilbert Islands. Both Tuvalu and the Gilbert Islands remained British

Antigua, Belize, Bermuda, British Virgin Islands, Cayman Islands, Central and Southern Line Islands, Falkland Islands and dependencies, Gilbert Islands, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Montserrat, Pitcairn, St. Helena and dependencies, St. Lucia, St. Vincent, Solomon Islands, Turks and Caicos Islands, and Tuvalu.

When faced on the oral argument with the advice that the United Kingdom had not extended the Convention to the Bahamas and that the Bahamas has not succeeded to the Convention since its independence, and when asked if he had anything to show to the contrary, counsel for Vesco replied: "No, Sir."

Moreover, there is much to be said in support of the view that, even if the terms of the Convention were applicable, the Convention was not intended to abrogate the methods of service prescribed by F.R.C.P. Rule 4.[16]

colonies, and thus the Convention remained in effect there. This is why the Colony is mentioned in the May 15 letter and why Tuvalu and the Gilbert Islands are mentioned in Treaties in Force. Tuvalu became independent on October 1, 1978 and has not as yet succeeded to the Convention. The Convention is not currently in effect in Tuvalu, and, absent subsequent succession, this fact will be reflected in 1979 Treaties in Force by deleting the reference to Tuvalu.

Finally, the Solomon Islands became independent on July 7, 1978 and have not since succeeded to the Convention. This fact will also be reflected by deleting reference to this country in the 1979 edition of Treaties in Force, absent subsequent succession to the Convention.

16 The Treaties Affairs Office of the Department of Justice has compiled a lengthy work entitled *International Judicial Assistance* (Department of Justice, September 1976). This document discusses service of American documents in foreign countries as well as other issues of importance involved in international litigation. *See also* Memorandum to United States Marshals Concerning Instructions for Serving Foreign Judicial Documents in the United States and for Processing Requests by Litigants in This Country for Service of American Judicial Documents Abroad (Department of Justice Memo No. 386, Revision 2, June 15, 1977).

Part Three

We Approve Judge Stewart's Finding that Service of the Amended Complaint on Vesco at the Brace Ridge Road Residence on October 24, 1973 by Joseph A. Bondi, et al. was Invalid and Ineffective.

On Appeal No. 3, by Vesco & Co., Inc., before the panel of this Court consisting of Judges Oakes, Wyzanski and Holden, Judge Stewart's order making this finding of invalidity was affirmed, as above stated. But because Vesco & Co., Inc. did not challenge the finding then but Vesco now does challenge it in 78-7092, the first of the two consolidated appeals now before us, we think it proper to dispose of the matter so as not to leave any loose ends that might be resorted to in the future by either Vesco or Vesco & Co., Inc. for purposes of further delay.

Judge Stewart set this service of the amended complaint aside because it was not made in compliance with his order authorizing Messrs. Bondi and others to make the service. He was not deciding any question of due process or constitutional law but was merely interpreting the terms of his own order. The order pursuant to which Miss Yohonn made service on July 30, 1973 merely required that a copy of the summons and complaint be "deposited" on the premises of the residence at Brace Ridge Road. And this was after the throwing back of the papers in the first attempted service, and after Miss Yohonn had telephoned Judge Stewart for permission to proceed again, this time under the order of July 29, 1973, which merely required that the papers be "deposited" on the premises. She did deposit the papers on the premises and she took a photograph of them lying on the lawn, identified by the blue ribbon.

In the case of the amended complaint the order required that Mr. Bondi or one of his alternates "leave" the summons and complaint at the Brace Ridge Road residence and this was not done. Bondi had thrown the papers over the gate and on to the driveway. One of the gardeners picked them up and handed them to a security guard, who had been summoned from the Bahamas Commonwealth Bank, and the security guard threw them into Bondi's car.

So Bondi drove away with the summons and complaint in his car. Obviously, the summons and complaint had not been "left" at Vesco's residence. Thus there is no inconsistency whatever between Judge Stewart's ruling that the service of the original summons and complaint on Vesco on July 30, 1973 was *valid* and his ruling that the service of the amended complaint on Vesco on October 24, 1973 was *not valid*. We must and do assume that Judge Stewart had good and sufficient reasons for the different wording of his various orders authorizing service pursuant to F.R.C.P. Rule 4(i)(1)(E).

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17 The order stated in relevant part:

"* * * it appearing that Joseph A. Bondi, David M. Butowsky and Daniel L. Carroll are qualified persons over twenty-one years of age and are not parties to this action, and that there are difficulties entailed in the service of the summons and complaint and that it is expedient that service be made by any of said persons, it is hereby

"ORDERED, that [the above stated individuals] * * * be and each hereby is authorized to effect service in the within action on defendants Robert L. Vesco, * * *, and it is further

"ORDERED, that service of process upon any of said defendants may be (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) as to individual defendants, by leaving a copy of the summons and amended complaint herein upon the premises of such defendant's last known residence located in Nassau, Bahamas and mailing a copy thereof to such defendant at either the Post Office Box of such defendant or to the address of such last known residence of such defendant in Nassau, Bahamas; or (iii) as to corporate defendants * * *."

PART FOU

In the Second of These Two C.. olidated Appeals (78-7279) We Affirm Judge ewart's Finding That Effective Service Was Made on Vesco at the Brace Ridge Road Residence in Nassau on April 17, 1974 and His Denial of Vesco's Motion to Vacate the Default Judgment Based on Such Service and Entered on September 11, 1974.

We have postponed discussion of the questions raised on Vesco's second of the two consolidated appeals to avoid unnecessary repetition of much that is stated in the foregoing parts of this opinion. This Appeal 78-7279 is from an order of Judge Stewart, in an action entirely different from the one we have been discussing. This order denies a motion by Vesco to vacate a default judgment entered against him on September 11, 1974 but based on service made at the same Brace Ridge Road residence of Vesco that has been the subject matter of our discussion in PART TWO of this opinion. Because some of the same or very similar questions were involved we consolidated the two appeals.

The complaint in this case was filed on April 8, 1974 and alleged fraud with regard to the purchase and sale of shares of the Empire Financial Corporation, in violation of Section 10(b) of the 1934 Act, 15 U.S.C. §17j(b) and Rule 10b-5, 17 C.F.R. §240.10b-5, as well as related State law claims. When ICC was unable to purchase the shares for its own account, Vesco interceded and purchased the shares, agreeing to hold them for resale to ICC. Later Vesco agreed to account to ICC for any profits he received on the sale should ICC decide not to exercise its option. ICC never exercised this option, and when Vesco ulti-

mately sold the shares he and his associates realized a total profit of $2,900,000. No prior arrangement had been made to share these monies with ICC. ICC obtained a default judgment against Vesco in the amount of $2,900,000.[18]

Service in this case was carried out pursuant to a court order entered on April 7, 1974 under Rule 4(i)(1)(E) of the Federal Rules of Civil Procedure. The order authorized David M. Butowsky, Special Counsel to ICC, to serve Vesco in Nassau by any method provided by Rule 4, or by "leaving" a copy of the summons and complaint at Vesco's last known residence in Nassau and by mailing the papers to Vesco at his address or Post Office Box.[19] On April 16,

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18 We pause to address the question of subject matter jurisdiction, though this was not briefed by the parties. *Clarkson Co., Ltd.* v. *Shaheen*, 544 F.2d 624 (2d Cir. 1976). Only actual purchasers and sellers may bring suit under Section 10(b). *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974); *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). The definitional provisions of the 1934 Act extend the meanings of "purchase" and "sale" to "any contract" to buy or sell or otherwise acquire or dispose of securities. Sections 3(a)(13)-(14) of the 1934 Act, 15 U.S.C. §§78c(a)(13)-(14). The majority in *Blue Chip Stamps* stated that "the holders of puts, calls, options, and other contractual rights or duties to purchase or sell securities" come within these definitions. 421 U.S. at 751. We feel that the complaint sufficiently pleads fraud pertaining to a contract or option to purchase Empire shares to give ICC standing to sue under the Securities Laws. *Hagans* v. *Levine*, 415 U.S. 528 (1974); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Bell* v. *Hood*, 327 U.S. 678 (1946).

19 This order stated in relevant part:

"* * * it appearing that David M. Butowsky is a qualified person over twenty-one years of age and not a party to this action, and that there are difficulties entailed in the service of the summons and complaint and that it is expedient that service be made by said person, it is hereby

"Ord..ED, that David M. Butowsky, be and hereby is, authorized to eff.. ..rvice of process in the within action on defendant Robert L. Ves.., and it is further

"ORDERED, that service of process upon said defendant may be (i) by any method of service of process authorized by Rule 4 of the

1974, Butowsky went to Nassau, and, on Wednesday, April 17, he and the United States Consul proceeded to Vesco's Brace Ridge Road residence. There they were met by two guards who prevented them from entering the premises. When Butowsky held out an envelope containing the summons and complaint and identified himself and his intention, one of the guards responded, "We are instructed not to accept any papers." Butowsky then dropped the envelope in front of the guards, who remained mute, and asked them to deliver it to Vesco. After this Butowsky left Vesco's residence and, later that day, mailed an additional copy of the summons and complaint to Vesco at his Post Office Box in Nassau by registered mail.

Butowsky based his belief that the Brace Ridge Road home had remained Vesco's residence in Nassau on his attempted service of the amended complaint in the first of these appeals, his renewed inquiries during this trip to Nassau, and the statement of various residents of Nassau as well as of a former Vesco employee with personal knowledge of Vesco's comings and goings from the Brace Ridge Road home.

We find nothing presented in support of Vesco's motion to controvert what is established by the affidavits supporting the facts we have just recited. The arguments to the effect that Vesco was domiciled in Costa Rica, that he had various places of residence, and that his whereabouts were at all times a matter of public knowledge are of no more

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Federal Rules of Civil Procedure; or (ii) by leaving a copy of the summons and complaint herein upon the premises of the defendant's last known residence in Nassau, The Bahamas and mailing a copy thereof to the defendant at either the Post Office Box of the defendant or to the address of the last known residence of the defendant in Nassau, The Bahamas."

validity or relevance here than they were in connection with the first of the two consolidated appeals (78-7092).

The summons and complaint were clearly "left" at Vesco's residence and Judge Stewart so found in his opinion of May 2, 1978. As in the case of the service made by Miss Yohonn, we think there was a clear compliance with the constitutional requirements of due process.

Conclusion

Further delay in this Vesco situation is intolerable. After five years of procedural maneuvers it surely is time to clear the decks for action and prevent further dissipation of assets that should be available to reimburse the investors who have been defrauded.

In each of the two consolidated appeals the order is affirmed with costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO, et al.,

Defendants.

Civil Action No. 73 Civ. 2518

ORDER APPOINTING PERSON
TO SERVE PROCESS

Upon the annexed affidavit of C. Leonard Gordon sworn to on July 27, 1973, and it appearing that Lois S. Yohonn is a qualified person over twenty-one years of age and is not a party to this action, and that speed is essential in the service of the summons and complaint and that there will therefore be a saving in fees if service is made by said person, it is hereby

ORDERED, that Lois S. Yohonn be and she hereby is authorized to effect service of process in the within action on defendant Robert L. Vesco.

Dated: New York, New York
July 27, 1973

s/ Charles E. Stewart, Jr.
U.S.D.J.

Entered July 31, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO, et al.,

Defendants.

Civil Action No. 73 Civ. 2518

ORDER APPOINTING PERSON TO SERVE PROCESS

Upon the affidavit of C. Leonard Gordon sworn to on July 27, 1973, and it appearing that Lois S. Yohonn is a qualified person over twenty-one years of age and is not a party to this action, and that speed is essential in the service of the summons and complaint and that there will therefore be a saving of fees if service is made by said person, it is

hereby

ORDERED, that Lois S. Yohonn be and she hereby is authorized to effect service of process in the within action on defendant Robert L. Vesco, and it is further

ORDERED that, service of process upon said defendant Robert L. Vesco may be effected by depositing a copy of the summons and complaint herein upon the premises of the last known residence of said defendant located in Nassau, Bahamas, and mailing a copy of the summons and complaint herein to said defendant at the address of such last known residence in Nassau, Bahamas.

Dated: New York, New York
July 29, 1973

s/ Charles E. Stewart, Jr.
U.S.D.J.

Entered July 31, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO, et al.,

Defendants.

Civil Action No. 73 Civ. 2518

AFFIDAVIT

LOIS SYLOR YOHONN, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Shea Gould Climenko & Kramer, 330 Madison Avenue, New York, New York 10017, General Counsel for International Controls Corp., plaintiff herein.

2. By Order dated July 27, 1973, I was authorized to serve the

Summons and Complaint herein upon the defendant Robert L. Vesco ("Vesco").

3. On Saturday, July 28, 1973 I proceeded to Nassau, the Bahamas. Having been informed that there were guards stationed at the residence of defendant Vesco, I determined to first attempt to serve him personally other than at his house. Therefore, after making numerous inquiries as to the possible whereabouts of defendant Vesco, I spent the afternoon and evening of Sunday, July 29, and most of the day on Monday, July 30 searching for the said defendant in various places located in Nassau and Paradise Island, the Bahamas, which places I had been informed defendant Vesco frequented. These places included several restaurants, hotels, other places of

entertainment, and yacht marinas.

4. Late in the afternoon on July 30, 1973, having been unsuccessful in locating the defendant Vesco up to that time, I proceeded to his residence on Brace Ridge Road, Nassau, the Bahamas.

5. Upon arriving at the defendant's residence, I proceeded to the gate of the grounds, which was locked and secured by three bolts. Two men who appeared to be guards were standing in the driveway near the gate. They approached and asked what I wanted. I inquired whether this was Mr. Vesco's house. After some evasion, one of the guards said that it was, and asked what I wanted.

6. I told him that a friend of Mr. Vesco in New York had suggested

I stop by while I was in Nassau, and asked if I could speak to Mr. Vesco. The guard asked my name and I told him that I was Miss Yohonn.

7. One of the guards said that he would have to check, and went inside the house. The other guard remained in the driveway. While the first guard was in the house, a car drove up containing several persons, including a woman whom I believe to be Mrs. Vesco, and two children. The remaining guard opened the gate for the car to enter; I remained standing outside the gate. After the people had gotten out of the car and entered the house, a boy of about 16 or 17 years old came out of the door, came up to me at the gate, and said, "My father said to ask you what you want." I replied,

"I want to serve him with a summons and complaint in an action entitled ICC v. Vesco." The boy jumped back and I threw the complaint at him. He caught it and threw it back at me, and ran back into the house. I then picked up the papers and handed them to one of the guards saying, "I am serving you with the summons and complaint in ICC v. Vesco." The guards then became belligerent, threw the papers at me and said repeatedly, "You get out of here. We don't want no papers on this property. Don't you put anything on this property." They then threw the complaint out in the road.

8. At this point, being somewhat afraid of the guards, I ran back to my car, which was parked several yards down the road, and drove

back to the Paradise Island Hotel.

9. I returned to my room and telephoned the Chambers of Charles E. Stewart, District Judge, to inform him of what had happened and to request that he authorize me to use the ancillary order which had been previously prepared and signed on July 29, 1973, which Order permitted me to effect good service upon defendant Vesco by depositing a copy of the summons and complaint upon the premises of defendant Vesco's residence on Brace Ridge Road. Judge Stewart authorized me to effect service as provided in this second Order.

10. Anticipating possible problems upon my return to defendant Vesco's residence, I rolled up the said summons and complaint and tied it with

a blue ribbon in order to facilitate throwing it over the wall onto the property.

11. I then hired a taxi and instructed the driver to drive along the coast road, which he did. I then told him to turn on to Brace Ridge Road, drive to the end, and come back. When we came even with the beginning of Mr. Vesco's property, which was located several yards from the gate at which the guards were standing, I told him to stop. I got out of the car, threw the summons and complaint onto the lawn a few feet from the front door of the house, and took a photograph of the premises with the summons and complaint lying on the lawn. I then got quickly back into the taxi. At this point, the two guards came running out of the

gate, one of them bearing a piece of pipe and the other carrying a stick. One of them pulled open the door of the taxi and ordered me to get out. I answered, "No." He held the door open and kept saying, "You get out of that car, you take back those papers." I again refused. At this point, the taxi driver said to the guard, "This lady hired me. You can't do anything to her while she is in my taxi." I then said to the guard, "Close that door immediately. You have no right to touch this car." The guard replied, "You have no right to put anything on this property." One guard then said to the other, "Go call the C.I.D.". (The C.I.D. is the Bahamian Secret Police). There then ensued a period of one or two minutes during which the guard

continued to demand that I get out of the taxi; the taxi driver insisted that I had hired him and that the guards had no right to touch the car; and during which I repeatedly requested the taxi driver to drive on. Finally, the taxi driver put the car into gear and started to drive slowly down the road. At this point, I noticed that Vesco's son, whom I had spoken with earlier, was standing in the middle of the road watching the altercation. The taxi driver drove slowly to the end of the road and proceeded onto the coast road. A short way down the road, he said to me, "Ma'am, those men are following us. They are in the car behind the car in back of us." At this point, becoming seriously concerned for my safety, I

instructed the driver to proceed to the Britannia Beach Hotel, which is a hotel some distance from the Paradise Island Hotel, but connected thereto by various corridors and the like.

12. I got the name and taxi number of the driver, and requested that he be good enough not to inform anyone of my whereabouts in the event the people in the car which had followed us approached him and asked any questions. I then proceeded by a circuitous route back to the Paradise Island Hotel, placed the film in my camera in a safe-deposit box and proceeded to my room. I remained in my room for perhaps one hour, during which on a couple of occasions the telephone rang. Each time I picked it up there was no one on

the line.

13. I do not know whether or not the last-mentioned event is of any significance, but I was and continued to be concerned for my personal safety from that point until I left the Bahamas, which was the following day, July 31, there being no further flights available on July 30 after my return to the hotel at approximately 7:00 p.m.

14. On August 1, after my return to New York, I mailed an additional copy of the summons and complaint herein to defendant Robert L. Vesco, addressed to him at his last known residence in Nassau, the Bahamas at Brace Ridge Road, by depositing true and correct copies of the same, properly enclosed in a first class post paid wrapper, in the official depository

maintained and exclusively controlled by the United States Government at 330 Madison Avenue, New York, New York 10017.

s/ Lois Sylor Yohonn

Sworn to before me this
6th day of August, 1973.

s/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO, et al.,

Defendants.

Civil Action No. 73 Civ. 2518

JUDGMENT

This action having been commenced by the filing of a complaint and the issuance of a summons on the 7th day of June, 1973, and this court by order dated July 27, 1973, having authorized Lois Sylor Yohonn to effect service of process herein on defendant Robert L. Vesco, and a copy of the said summons and complaint having been duly served on defendant Robert L. Vesco by Lois Sylor Yohonn on the 30th day of

July, 1973, and proof of such service having been filed in the office of the Clerk of this Court on the 6th day of August, 1973; and

Defendant, ROBERT L. VESCO, having failed to plead, appear, move or otherwise defend with respect to the complaint herein, and the time for said defendant to appear, answer or otherwise move having expired, and said defendant's default having been noted and entered;

AND, it appearing to the court that there is no just reason for delay in entering the within judgment against defendant Robert L. Vesco;

NOW, on motion of Shea Gould Climenko & Kramer attorneys for the plaintiff, and, upon the affidavit of Sheldon D. Camhy, sworn to the 2nd day

of October, 1973 that defendant Robert L. Vesco is not an infant or incompetent person and is not in the military service of the United States; it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against the defendant Robert L. Vesco as demanded in the complaint herein; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Robert L. Vesco be, and he hereby is, permanently enjoined from using the assets of plaintiff or its subsidiaries or the proceeds thereof for his own purpose to the loss and detriment of International Controls Corp. and its shareholders; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Robert L. Vesco account to plaintiff for all profits or gains received by him or those acting in concert with or aiding and abetting him in the transactions set forth in the complaint herein or in transaction thereafter entered into by him with funds or property wrongfully held by him by reason of the wrongful acts set forth in the complaint and all injury sustained by plaintiff by reason of the acts alleged in the complaint; and it is further

ORDERED, ADJUDGED AND DECREED that Robert L. Vesco be and he hereby is required to indemnify plaintiff for all liability to others which it has or may incur by reason of the acts alleged in the complaint; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Robert L. Vesco be and he hereby is, liable to plaintiff for all loss, damage, cost and expense arising from the acts alleged in the complaint herein and that the amount of said loss, damage, cost and expense be determined by the Court upon a hearing; and it is further

ORDERED, ADJUDGED AND DECREED that the aforesaid hearing as to plaintiff's loss, damage cost and expense be set down and held on a day designated by plaintiff, upon the plaintiff giving defendant Robert L. Vesco ten days notice of said hearing by registered or certified mail at Brace Ridge Road, Nassau, The Bahamas and 170 Denville Road, Boonton Township, New Jersey 07005; and it is further

ORDERED, ADJUDGED AND DECREED that upon the holding of the aforesaid hearing as to plaintiff's damages and the determination of said damages, the within judgment be amended granting plaintiff judgment against defendant Robert L. Vesco for the amount of such loss, damage, cost and expense together with interest and costs and disbursements of this action and that such amended judgment be entered against defendant Robert L. Vesco; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff shall have the right to apply at the foot of said judgment for such other and further relieve [sic] as to the Court may seem just and proper in the circumstances.

s/ Charles E. Stewart, Jr.
U.S.D.J.

Entered October 5, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO, et al.,

Defendants.

Civil Action No. 73 Civ. 2518

AFFIDAVIT

JOSEPH A. BONDI, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Shea Gould Climenko & Kramer, 330 Madison Avenue, New York, New York 10017, general counsel for International Controls Corp., plaintiff herein.

2. By order dated October 19, 1973, David Butowsky, Special

Counsel to International Controls Corp., and I were authorized to effect service of process herein upon defendants Robert L. Vesco, Norman LeBlanc, Stanley Graze, Richard E. Clay, Wilbert J. Snipes, Frederic E. Weymar, Gilbert R. J. Straub, C. Henry Buhl III, Ralph P. Dodd, Shirley Bailey, I.O.S., Ltd., Columbus Trust Company, Limited, Bahamas Commonwealth Bank ("BCB"), International Bancorp, Kilmorey Investments, Ltd., Value Capital, Ltd., Global Holdings Ltd., Global Financial Ltd., Butlers Bank Ltd. (now known as Who Holdings Ltd.) and Allan J. Butler.

3. On Monday, October 22, 1973, David Butowsky and I proceeded to Nassau, Bahamas. On Tuesday,

October 23, 1973 at approximately 9:30 A.M., Mr. Butowsky and I went to the premises in Nassau, Bahamas known as "Charlotte House" in which defendant BCB is located and we ascertained by examining a listing inside the bank premises that BCB was the registered agent for defendants Global Financial Ltd., Global Holdings Ltd. and Kilmorey Investments Ltd. Thereupon, we approached a receptionist situated at a desk on the main banking floor near a stairway providing access to offices on the second floor, including those of certain of the other corporate defendants herein. The receptionist identified herself as Norma Russell. We asked Miss Russell whether Norman LeBlanc, President of BCB, was available for us to deliver some papers. Miss

Russell, in our presence, checked by telephone with Mr. LeBlanc's office and told us that she had been authorized to accept papers on Mr. LeBlanc's behalf. We thereupon identified ourselves to Miss Russell and left with her three copies of the Summons and Amended Complaint herein, which were in envelopes marked Global Financial Ltd., Global Holdings Ltd. and Kilmorey Investments Ltd. Miss Russell provided us with a written receipt for the Summons and Amended Complaint herein.

4. Immediately thereafter, a woman who identified herself as Miss Hastie, Norman LeBlanc's secretary, appeared, accompanied by a man who identified himself as a security officer of BCB. I recognized Miss

Hastie as being one of Mr. LeBlanc's secretaries from a prior visit to Mr. LeBlanc. Miss Hastie asked us what we wanted and we advised her that we wished to serve defendants in the action herein with a Summons and Amended Complaint. She stated that she could not accept the Summons and Amended Complaint and we stated that Miss Russell had accepted them.

5. Mr. Butowsky and I thereupon left the BCB by its main entrance and proceeded to a side entrance which we knew from a prior visit led to defendant LeBlanc's office. We proceeded to the wooden door to Mr. LeBlanc's private offices, which was locked, and I affixed to the door a copy of the Summons and Amended Complaint. As I was doing this, Miss

Hastie, two uniformed guards and the security officer we met previously ran towards us yelling that we should leave at once. We immediately left and Miss Hastie ripped the Summons and Amended Complaint from the door and threw it at us.

6. Thereafter, at about 10:15 A.M., Mr. Butowsky and I drove to the Sonesta Beach Hotel in Nassau, Bahamas, to seek to attend a share-holders meeting of Investment Properties International, Ltd. ("IPI"), which was scheduled for 10:00 A.M. that morning. Defendants Norman LeBlanc and Gilbert R. J. Straub were listed in the notice of meeting as being shareholders proposed to be selected as members of a committee of inspectors with the power of appointing a liquidator of IPI and we

believed that we might possibly be able to serve them personally at the meeting. Upon arriving at the hotel we inquired where the meeting was being held and were advised that the meeting had been adjourned as no quorum had been present and that Messrs. Straub and LeBlanc were also not present.

7. Thereafter, at about 11:00 A.M., Mr. Butowsky and I proceeded to Beaumont House, located in Nassau, Bahamas, in which the offices of defendant Columbus Trust Company, Ltd. are located. We proceeded to the offices of Columbus Trust Company Ltd. and asked to see Mr. Frederick Murray, the Secretary of Columbus Trust Company Ltd. We introduced ourselves to Mr. Murray, advised him why we were

in Nassau and I served him with a copy of the Summons and Amended Complaint herein.

8. Thereafter, at about 12:15 P.M., Mr. Butowsky and I went to a premises located on Charlotte Street, Nassau, Bahamas, in which we had been advised defendant Allan J. Butler had his offices. We asked a person present in the office if Mr. Butler was there and a lady who identified herself as Miss Knowles and stated that she was Mr. Butler's secretary advised us that Mr. Butler was in the United States. We asked Miss Knowles if the office was also the office of Butlers Bank Ltd. (now known as Who Holdings, Ltd.) and she stated that it was. After identifying ourselves, we advised Miss Knowles

that we were serving Butlers Bank, Ltd. (now known as Who Holdings Ltd.) with a Summons and Amended Complaint in the action herein on Allan J. Butler and would leave it with her. She promised us that she would give the Summons and Amended Complaint herein to Mr. Butler upon his return. The road from Mr. Butler's office required that we pass the premises occupied by BCB and we observed that uniformed security guards were patrolling the sidewalk in front of the bank and the entrance to Mr. LeBlanc's office.

10. Thereafter, on October 23, 1973, Mr. Butowsky and I made inquiries from persons as to the possible whereabouts of the individual defendants herein and then sought to

locate such persons at various restaurants and other establishments known to be frequented by them.

11. On October 24, 1973, Mr. Butowsky and I engaged the services of a resident of Nassau, Bahamas who was familiar with the roads on New Providence island and who, we believed, would be helpful in locating the residences of various of the defendants herein. At about 1:30 P.M. on October 24, Mr. Butowsky, the local guide and I drove to the offices of BCB, and I entered the main entrance of the bank with copies of the Summons and Amended Complaint herein, which were marked with the names of Bahamas Commonwealth Bank, International Bancorp, Kilmorey Investments, Ltd., I.O.S., Ltd., Value Capital Ltd., Global Holdings Ltd. and

Global Financial Ltd. As there had been guards patrolling the bank premises and the sidewalk outside the bank building following our visit on the previous day, and as other guards had chased us while we were serving process herein on the previous day, we deemed it imprudent to wait in the bank and make extended inquiries as to the presence of officers. I deposited the copies of the Summons and Amended Complaint herein with the receptionist in the bank and advised her that these were papers in the action herein being served on BCB and on various corporations for which BCB was registered agent. We then left the premises.

12. Thereafter, Mr. Butowsky, the local guide and I proceeded to the

residence located on Brace Ridge Road, Nassau, Bahamas, which we had been advised was the last known residence of, and owned by, defendant Gilbert R. J. Straub and was also the last known residence in Bahamas of defendant Robert L. Vesco and an occasional residence of defendant Norman LeBlanc. This was the same residence at which Mr. Vesco had been personally served with a subpoena by an Assistant United States Attorney and at which plaintiff herein had served Mr. Vesco with the original Summons and Complaint. Upon arriving at such premises, we proceeded to the gate. Two men who identified themselves as gardeners were standing at the gate and asked us what we wanted. We identified ourselves and stated that we wished to serve the

Summons and Amended Complaint herein on Messrs. Vesco, LeBlanc and Straub.

13. One of the gardeners proceeded into the house to call BCB and the other gardener remained inside the gate watching us. After approximately ten minutes a car approached, occupied by the same man who had identified himself as a security officer of BCB on the previous day and a man named Charles Evans, who, from our previous visit to Nassau, Bahamas we believed to be employed as a chauffeur by either defendant LeBlanc or for defendant LeBlanc by defendant BCB. These gentlemen asked what we wanted and we identified ourselves and stated that we wished to serve the Summons and Amended Complaint herein on Messrs. Straub, Vesco and LeBlanc.

The men said that they could not accept the papers and the man who had previously identified himself as a security officer for Bahamas Commonwealth Bank abruptly removed a miniature camera from his shirt pocket and proceeded to take photographs of both Mr. Butowsky and me.

14. I thereupon sought to hand copies of the Summons and Amended Complaint herein to the gardeners and they jumped back. I then tossed copies of the Summons and Amended Complaint herein over the gate and onto the driveway inside the premises. One of the gardeners picked them up and handed them to the security officer who threw them into our car. We then drove away.

15. Mr. Butowsky, the local guide and I then drove to the Sonesta Beach Hotel, which we had been informed was one of the customary residences of Mr. LeBlanc in Nassau, Bahamas. I went to the front desk of the Sonesta Beach Hotel, asked for Mr. LeBlanc and was advised that he was not present. I stated that I wished to leave a Summons and Amended Complaint herein for him and was told that I could leave it with the desk clerk, who assured me that he would see that it was promptly given to Mr. LeBlanc.

16. Mr. Butowsky, our local guide and I then proceeded to Knob Hill Apartments, located off East Bay Street, Nassau, Bahamas. We had been advised that Knob Hill Apartments was a known residence of Norman LeBlanc in

Nassau, Bahamas. We inquired of one of the residents in the apartment complex where Mr. LeBlanc's apartment was and were advised that Mr. LeBlanc had been known to reside in an apartment on the first floor. We then proceeded to such apartment, and knocked on the door. We received no answer. I thereupon taped a copy of the Summons and Amended Complaint herein on the doorway of such premises.

17. Mr. Butowsky, our local guide and I then proceeded to a premises in Nassau, Bahamas, located opposite the residence of a Dr. Applewood, which premises, we had been advised, was presently the residence of Miss Wendy Kenyon, and also one of

the customary residences of Mr. LeBlanc in Nassau, Bahamas. We rang the doorbell and knocked on the door of such premises and did not receive an answer. We thereupon returned to our hotel.

18. At 8:00 o'clock on the evening of October 24, Mr. Butowsky and I drove to the premises of Miss Wendy Kenyon. We approached the doorway and rang the bell. A person inside with a female voice asked who we were and we identified ourselves as David Butowsky and Joseph Bondi. The person inside refused to open the door and I thereupon taped a copy of the Summons and Amended Complaint herein to the outside of the door.

19. We then proceeded to the Cafe Martinique on Paradise

Island, Bahamas, known by us to be a restaurant frequented by various of the defendants herein. We asked a waiter if he had seen Messrs. LeBlanc, Straub, Clay or Vesco that evening and he said he had not but believed that several of them had been present the previous evening. He then searched the restaurant for such persons and advised us that none were present.

20. At approximately 7:00 A.M. on the morning of October 25, 1973, I received a telephone call from a man who identified himself as (and whose voice I recognized as) Norman LeBlanc. Mr. LeBlanc advised me that he was calling from Costa Rica and that our conversation was being tape recorded. He asked that I cease harrassing his secretary by leaving

copies of the Summons and Amended Complaint herein taped on the doorway of her residence. I replied that we were not seeking to harrass him or any other persons, but that we were seeking to effect service in the action herein. He then stated that I should govern my actions in accordance with Bahamian law and that such service was not effective under Bahamian law. I advised him that we believed our service to be effective under the laws of the United States of America and that we were seeking to serve him in an action pending in courts of the United States of America. Mr. LeBlanc suggested that I retain Bahamian counsel and repeated that I should

cease harrassing him and his secretary.

21. After breakfast on the morning of October 25, 1973, I asked the switchboard operator if I had any messages and she advised me that a man had sought to telephone me at ten minute intervals between 9:30 and 11:00 P.M. on the evening of October 24. I believe that this was Mr. LeBlanc.

22. On the morning of October 25, 1973, Mr. Butowsky and I went to the general post office in Nassau, Bahamas and obtained the Post Office box numbers from the inquiry clerk therein of defendants Robert L. Vesco, Gilbert R. J. Straub, Bahamas Commonwealth Bank, Allan J. Butler, Butlers Bank, and of Miss Wendy Kenyon. [There is no street mail delivery service in the Bahamas]. I

thereupon purchased stamps and deposited copies of the Summons and Amended Complaint herein in envelopes addressed to the Post Office boxes of Bahamas Commonwealth Bank; International Bancorp, Kilmorey Investment Ltd., Value Capital Ltd., Global Holdings Ltd., Global Financial Ltd., and I.O.S., Ltd., all c/o Bahamas Commonwealth Bank; Robert L. Vesco, Gilbert R. J. Straub, Allan J. Butler, Butlers Bank Ltd. (now known as Who Holdings Ltd.) and Norman LeBlanc c/o Miss Wendy Kenyon. I then deposited all such envelopes, with the proper postage affixed, into the mail receptacle located in the post office.

23. Thereafter, I went to my hotel to pack and proceed to the airport. I noticed that the man who

had identified himself as a security guard of BCB and whom I had met previously at the residence at Brace Ridge Road was sitting outside my hotel. I thereupon checked out of the hotel, intending to proceed by my rented automobile to the airport. Before leaving Paradise Island I noticed that the security officer was following me in an automobile. I sought to verify that he was following me by first driving quickly, then slowing down, then halting and then turning on a side road. He continued to follow me and I determined that it would not be prudent to drive to the airport. I thereupon returned the automobile at the Avis depot in Nassau and proceeded by taxi to the aitport [sic]. I did not notice the security

guard following the taxi until I reached the main entrance at the airport. At that time, I again noticed the security guard and upon leaving the taxi at the airport immediately approached a policeman. I pointed out the security guard to the policeman and stated that he had been following me. The policeman stated that he knew the security guard to be a former Nassau policeman and asked me who I was. I identified myself and stated that I had been authorized by a United States court to serve process on various defendants including Robert L. Vesco and Norman LeBlanc and that I believed the security guard to be in their employ. The policeman acknowledged that he also understood this to be the case and said that he

would see to it that I would board my airplane without interference. I boarded the airplane and left Nassau, Bahamas without further incident.

s/ Joseph A. Bondi

Sworn to before me this
twelfth day of November, 1973

s/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO, et al.,

Defendants.

Civil Action No. 73 Civ. 2518

AFFIDAVIT

ROBERT L. VESCO, being duly sworn, deposes and says:

1. I am now, and I have continuously since at least 1972 been a domicilary and permanent resident of the Republic of Costa Rica. I have also made an express declaration of my intention to continue to reside permanently in Costa Rica and adopt the nationality at the appropriate time.

2. My presence and status in Costa Rica has not been a secret. Quite to the contrary, it has been open, documented and internationally publicized. Moreover, on the 15th day of June, 1973, Viron P. Vaky, the Ambassador of the United States of America made a formal request to the Ministry of Foreign Relations of Costa Rica for my extradition and provisional arrest. This request was predicated upon the text of a warrant issued June 1, 1973, by Judge John M. Cannella of the United States District Court for the Southern District of New York.

3. A review of the documents submitted in support of the extradition application contains the statement that the United States Government and the

judicial authorities of the SDNY were not only aware of my status as a resident of Costa Rica travelling with a provisional Costa Rican passport, but argued that Costa Rica was my domicile and permanent home. (Paragraph 3 of page 9. Exhibit A with translation).

4. This extradition proceeding received international media coverage. At no time have I ever sought to hide my presence in Costa Rica. In point of fact, on numerous occasions reported in the international media, I have expressed my pleasure and gratitude in being accorded the opportunity to reside with my family in one of the finest democratic countries in the Western Hemisphere.

5. Miss Sylor Yohonn, in her affidavit dated August 6, 1973

states that pursuant to an order dated July 27, 1973, she was authorized to serve the summons and complaint upon me. She further stated that she unsuccessfully spent the afternoon and evening of Sunday, July 29 and most of Monday, July 30 searching for me in various places located in Nassau. She then alleges that she went to a house on Brace Ridge Road, Nassau, the Bahamas, where an unidentified person who appeared to be a guard indicated after some evasion that it was my house.

6. It is true that I have at various times been in the Bahama Islands, staying at different hotels, villas, houses and apartments. However, my principal place of residence and domicile was then and remains now,

the Republic of Costa Rica.

7. I do not now, nor have I ever owned, nor has any member of my family owned a house on Brace Ridge Road in Nassau, Bahamas. I have stayed at a house on Brace Ridge Road during several of my trips to Nassau, however, at other times I have also stayed at other locations while in Nassau.

8. I do recall recently reviewing a document prepared by one of the attorneys from International Controls Corp. (ICC) wherein he describes the house on Brace Ridge Road as being owned by Mr. Straub and resided in periodically by Messrs. LeBlanc and me along with other persons.

9. It would appear that this was a convenient way for counsel to attempt to establish one mail drop

for a number of persons without regard to the actual facts and in total disregard of fundamental principals of law. Fairness and due process surely require a more substantial predicate upon which to rest proper service of a summons - complaint.

10. Miss Yohonn further states that while she was outside the front gate of the premises, a teenage boy asked her what she wanted, and she replied that she wanted to serve a summons and complaint in an action entitled ICC vs. Vesco, and when the teenage boy jumped back, she threw the complaint at him, which he caught and threw back at her. She then gave the papers to the unidentified person who threw the papers at her in the road. Miss Yohonn indicated that she was

somewhat afraid and ran back to her car and drove to her hotel, where she claims to have telephoned the chambers of Charles E. Stewart, District Judge, on the evening of July 30, 197[3], to explain what occured and to request authorization to use an ancillary order which she states was signed on Sunday, July 29, 1973.

11. This purported order dated July 29, 1973 authorized the service of process by depositing a copy of the papers upon the premises of the last known residence of the defendant (not Brace Ridge Road) located in Nassau, Bahamas, along with mailing a copy to the same residence.

12. I state without qualification or reservation that at the time

the summons and complaint was purportedly left on the grass on the premises located at Brace Ridge Road, Nassau, Bahamas, as described in the Yohonn affidavit, I was not informed of such and in fact I was a resident and domicilary of the Republic of Costa Rica, a fact well known to the plaintiff and their counsel.

13. I further state, again without qualification or reservation, that personal service of the summons and complaint was not made upon me, and I further state to the best of my knowledge and belief, service of the summons and complaint was not made in Costa Rica, by mail, or otherwise at my then known place of residence.

14. A careful analysis of the Yohonn affidavit reveals a series

of fatal flaws. At no place in the affidavit does Miss Yohonn state that she had reason to believe that I was in fact in Nassau, Bahamas or attempting to avoid service during the period of time she was purportedly attempting to effect service of process upon me. As a matter of fact, Miss Yohonn quite clearly states that notwithstanding the fact she went to all the places where I would have normally been seen had I been in Nassau, she was unable to either find me or anyone who had even seen me.

15. The order of October 5, 1973 indicates that service of the summons and complaint was effected in accordance with the provisions of the order dated July 27, 1973. However,

the July 27, 1973 order required personal service of the summons and complaint and it is an uncontradicted fact that personal service was never made upon me. Miss Yohonn makes reference to the fact that she called chambers in the early evening of July 30, 1973 to ask permission to use another method of service as she was not able to effect personal service.

16. At no point does she ever explain how she knew on July 30 that an order had been signed on a Sunday, July 29, to permit another method of service, when on July 29, there was no need for an alternate means of service as she had not exhausted nor even begun her attempt at personal service. Having left New York on July 28, 1973 how did she know an

order was signed on Sunday, July 29? Moreover, why was it necessary to sign an order on a Sunday when at the time the order was signed, there was no reason for its existance? Furthermore, if she knew of its existance, why did she have to call for authorization to act pursuant to the order?

17. Miss Yohonn's affidavit offers no proof that the house on Brace Ridge Road was my last known residence in Nassau nor does she submit any evidence that the house was owned by me.

18. The concept of "last known residence" has application where a party is unable to ascertain the present whereabouts of a proposed defendant. To suggest that ICC was unaware or unable to determine where I

resided is at best ludicrous, when their own Special Counsel appointed by this court stated two weeks before that I was "residing in Costa Rica".

19. At one point in the Yohonn affidavit, she states that the summons and complaint was thrown out in the road by the unidentified person. She never indicates that she picked it up and in light of her statement that she was somewhat afraid of guards and ran back to her car, it is difficult to perceive that she did. Nevertheless, she later states that she rolled up the said summons and complaint and tied it with a blue ribbon. How she was able to tie a ribbon around a summons and complaint which was still lying on the road is rather difficult to explain or understand.

20. The irony of the matter is that ICC, by unilateral action, was successful in setting aside the service of the amended summons and complaint which was purportedly served in an identical fashion at Brace Ridge Road in Nassau, the Bahamas relying substantially upon the argument that at the time of the service the amended pleading, ICC knew of my residence in Costa Rica. It is of interest to note that ICC's knowledge of my Costa Rican residence is described in an affidavit dated prior to the purported service of the original summons and complaint, which is the subject of this motion.

21. On the 18th of June, 1973, the court appointed special counsel for ICC characterized me as a "fugitive from justice residing in

Costa Rica".

22. ICC realized that it had committed a fatal error in procuring a default judgement purportedly predicated upon allegations contained in the original complaint, when the pleading had in fact been amended. Despite the fact that an affidavit of service of the amended complaint was not at the time under attack by me, ICC advanced the very argument I am now submitting to this court, in support of its position to void the pleadings which would destroy the efficacy of its judgement. ICC cannot have it both ways.

23. It should not be permitted to argue that service of the amended pleading was properly set aside because I was residing in Costa Rica, however,

service of the original summons and complaint is valid. This position is untenable in view of the fact that the information relied upon namely: the Butowsky affidavit, clearly establishes in June of 1973, ICC's knowledge of my actual residence in Costa Rica. Any attempt to distinguish the purported service of the original complaint from the amended complaint is totally without merit.

24. I did not attack the purported service of the original summons and complaint before, as I was not and am not a resident or citizen of the United States and felt confident that I would be able to defend myself against any attempt to enforce the judgement resulting therefrom, in a court of competent jurisdiction at the

place of my domicile.

25. As a matter of fact, for the past two years, I have actively defended against an exequator proceeding initiated by ICC in Costa Rica. ICC is aware that one of my defenses in this proceeding is the original lack of jurisdiction, attacking the due process of the alleged default judgement due to the form of alleged service.

26. ICC realizing the ultimate success of these arguments in Costa Rica, initiated proceedings in the United States to satisfy the ICC judgement out of assets owned by Vesco & Co, Inc., a corporation that was organized as part of an estate planning program with my children.

27. It has come to my attention that Vesco & Co. assets are

in danger of being appropriated under a concept of "alter ego" and that the appelate procedure normally available may have been foreclosed by reason of prior counsel's negligence and omission to file a timely appeal. I am also aware of the fact that a petition for a writ of certioari [certiorari] has been filed with the United States Supreme Court to certain of these issues.

28. I also deem it appropriate to bring to this court's attention, matters which I have only recently become aware of, namely: ICC default judgement established damages in the amount of approximately 2.4 million dollars despite the fact that the entire sum was written off by the corporation as a tax deduction, reducing the alleged damage to the

corporation of approximately fifty percent of the judgement and certain other benefits have been obtained for the same alleged expenses, it would be unconscionable to permit such a judgement in the amount of 2.4 million to remain of record.

29. In view of the foregoing, I have at this time instructed counsel to appear in this action for the purpose of attack this courts jurisdiction over my person by reason of ICC's failure to properly effect service of the summons and complaint in accordance with notions of due process.

30. I request that the service of the summons and complaint be vacated and set aside and the judgement

and order thereunder be likewise vacated and set aside.

s/ Robert L. Vesco

Filed November 17, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO,

Defendant.

Civil Action No. 74 Civ. 1588

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LOIS SYLOR YOHONN, being duly sworn, deposes and says:

1. I am associated with the firm of Shea Gould Climenko & Kramer, attorneys for plaintiff in the above-entitled action. I make this affidavit in support of the instant application pursuant to Rule 4(c) of the Federal

Rules of Civil Procedure for an order appointing David M. Butowsky as a qualified person to effect service of the summons and complaint herein upon defendant Robert L. Vesco.

2. It appears that it may be possible to serve the defendant in Nassau, Bahamas. Since it is not feasible or practical to have the United States Marshal attempt to serve said defendant in the circumstances, and since the appointment of another to make service will result in the saving of fees of the United States Marshal, it is respectfully requested that David M. Butowsky be appointed to serve the summons and complaint herein upon said defendant. Mr. Butowsky is in

all respects qualified to serve process in this action.

s/
LOIS SYLOR YOHONN

Sworn to before me this
8th day of April, 1974.

s/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO,

Defendant.

Civil Action No. 74 Civ. 1588

ORDER APPOINTING PERSON TO SERVE PROCESS

Upon the affidavit of Lois Sylor Yohonn sworn to on April 8, 1974, and it appearing that David M. Butowsky is a qualified person over twenty-one years of age and not a party to this action, and that there are difficulties entailed in the service of the summons and complaint and that it is expedient that service be made by said person, it

is hereby

ORDERED, that David M. Butowsky, be and he hereby is, authorized to effect service of process in the within action on defendant Robert L. Vesco, and it is further

ORDERED, that service of process upon the said defendant may be (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) by leaving a copy of the summons and complaint herein upon the premises of the defendant's last known residence in Nassau, The Bahamas and mailing a copy thereof to the defendant at either the Post Office Box of the defendant or to the address of the last known residence

of the defendant in Nassau, The Bahamas.

Dated: New York, New York
April 9, 1974

s/ Charles E. Stewart, Jr.
U.S.D.J.

Entered April 9, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO,

Defendant.

Civil Action No. 74 Civ. 1588

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID M. BUTOWSKY, being duly sworn, deposes and says:

1. I am Special Counsel appointed by this Court in Securities and Exchange Commission v. Robert L. Vesco, et al, 72 Civ. 5001 (CES).

2. By order dated April 9, 1974 I was authorized to effect service

of process in the within action on defendant Robert L. Vesco either (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) by leaving a copy of the summons and complaint herein upon the premises of the defendant's last known residence in Nassau, The Bahamas and mailing a copy thereof to the defendant at either the Post Office Box of the defendant or to the address of the last known residence of the defendant in Nassau, The Bahamas.

3. On Tuesday, April 16, 1974 I proceeded to Nassau, Bahamas. On Wednesday, April 17, 1974, accompanied by Marvin Groeneweg, Consul to the United States of America, I proceeded to Brace Ridge Road, Nassau, Bahamas, which is known to me based

upon prior visits to such residence as the last known residence in the Bahamas of Robert L. Vesco. This is the same residence at which I had served Mr. Vesco with service of process in International Controls Corp. v. Robert L. Vesco, et al, 73 Civ. 2518. Upon my arrival at such premises I proceeded to a gate and was confronted by two men who stopped me from entering upon the premises. I held out the summons and complaint and stated that I would like to hand the envelope to Mr. Vesco. One of the guards stated to me "we are instructed not to accept any papers". Thereupon I dropped the envelope on the driveway and requested the guard to hand it to Mr. Vesco. He remained mute and I took leave of the

premises.

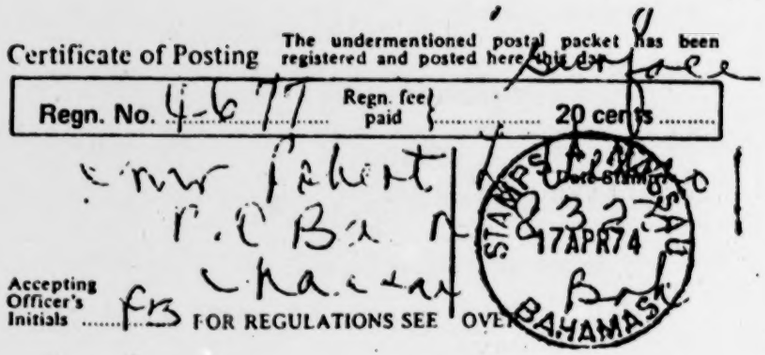
4. On April 17, 1974 I mailed a copy of the summons and complaint to Robert L. Vesco at his listed post office box no. N-8323 by registered mail. A copy of the receipt is affixed hereto as Exhibit A.

s/
David M. Butowsky

Sworn to before me this
22nd day of April, 1974.

s/
Notary Public

EXHIBIT A



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO,

Defendant.

Civil Action No. 74 Civ. 1588

JUDGMENT

This action having been commenced by the filing of a complaint on the 8th day of April, 1974, and this court by order dated April 9, 1974, having authorized David M. Butowsky to effect service of process herein on defendant Robert L. Vesco by David M. Butowsky on the 17th day of April, 1974, and proof of such service having been filed in the office of the Clerk

of this Court on the 24th day of April, 1974; and

Defendant, Robert L. Vesco, having failed to plead, appear, move or otherwise defend with respect to the complaint herein, and the time for said defendant to appear, answer or otherwise move having expired, and said defendant's default having been noted and entered;

AND, it appearing to the court that there is no just reason for delay in entering the within judgment against defendant Robert L. Vesco;

NOW, on motion of Shea Gould Climenko & Kramer, attorneys for the plaintiff and upon the affidavit of Sheldon D. Camhy, sworn to the 27th day of August, 1974; it is hereby

ORDERED, ADJUDGED AND DECREED

that plaintiff have judgment against the defendant Robert L. Vesco as demanded in the complaint herein; and it is further

ORDERED, ADJUDGED AND DECREED that defendant Robert L. Vesco be and he hereby is, liable to the plaintiff for damages in the amount of $2,900,000 together with interest thereon, by reason of the acts alleged in the complaint herein.

Dated: New York, New York
August 29, 1974

s/ Charles E. Stewart, Jr.
U.S.D.J.

Entered September 11, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

-against-

ROBERT L. VESCO,

Defendant.

Civil Action No. 74 Civ. 1588

ENDORSED DECISION ON MOTION TO VACATE DEFAULT JUDGMENT

Vesco's motion to vacate the default judgment pursuant to F.R.Civ.P. 60(b) is denied. The Court finds that the service of the summons and complaint was effectuated in a manner reasonably calculated, under the circumstances, to assure delivery to a place where the defendant was likely to receive it and complied with this Court's April 9, 1974 order. Although in his memorandum

in support of his motion Vesco asserts service was by registered mail, in fact a review of the affidavit of service indicates that a copy of the summons and complaint was left on the premises of the defendant's last known residence in the Bahamas and a copy was mailed by registered mail. The summons and complaint were delivered to a place reasonably assured to give the defendant notice, and in his present application the defendant has submitted nothing to counter this finding.

Accordingly, the defendant's motion to vacate the default judgment is denied.

SO ORDERED.

s/ Charles E. Stewart, Jr.
U.S.D.J.

May 2, 1978.
Entered September 11, 1974

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I—JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organize the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, or

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by—

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II—EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III—GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with—

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

(a) oppositions to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905 [99 BFSP 990], and on 1st March 1954 [286 UNTS 265], this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 23

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

COMMONWEALTH OF THE BAHAMAS

Office of the Prime Minister
P.O. Box N7147
Nassau, N.P. Bahamas

10th July, 1973

Your Excellency,

I have the honour to refer to my cable dated July 10th 1973.

I have the honour, further to inform you that the Government of the Commonwealth of The Bahamas, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of The Bahamas were succeeded to by the Commonwealth of The Bahamas

upon Independence by virtue of customary international law.

Since, however, it is likely that in virtue of customary international law certain treaties may have lapsed at the date of Independence of the Commonwealth of The Bahamas, it seems essential that each treaty should be subjected to legal examination. It is proposed, after this examination has been completed, to indicate which, if any, of the treaties which may have lapsed by customary international law the Government of the Commonwealth of The Bahamas wishes to treat as having lapsed.

It is desired that it be presumed that each treaty has been legally succeeded to by the Commonwealth

of The Bahamas and that action be based on this presumption until a decision is reached that the treaty should be regarded as having lapsed. Should the Government of the Commonwealth of The Bahamas be of the opinion that it has legally succeeded to a treaty, and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.

The Government of the Commonwealth of The Bahamas desires that this letter be circulated to all members of the United Nations, so that they will

be effected with notice of the Government's attitude.

Yours sincerely,

s/
PRIME MINISTER.

His Excellency Dr. K. Waldheim,
Secretary General of the
United Nations.

Operative July 10, 1973

Existing laws.

"4. (1) Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Bahamas Independence Act 1973(b) and this Order.

(2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the appointed day by or under the existing Order, that prescription or provision shall, as from that day, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Bahamas Independence Act 1973 and this Order) as if it had been made under the Constitution by Parliament or, as the case may require, by the other authority or person.

(3) The Governor-General may by Order made at any time before 10th July 1974 make such amendments to any existing

law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Bahamas Independence Act 1973 and this Order or otherwise for giving effect to or enabling effect to be given to those provisions.

(4) An Order made by the Governor-General under subsection (3) of this section shall have effect from such day, not earlier than the appointed day, as may be specified therein.

(5) The provisions of this section shall be without prejudice to any powers conferred by this Order or by any other law upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law.

(6) In this section 'existing law' means any law having effect as part of the law of the Bahama Islands immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day)."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1621

ROBERT L. VESCO,

Petitioner,

v.

INTERNATIONAL CONTROLS CORP.,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTAL PETITION

On April 24, 1979, the Petitioner, Robert L. Vesco, filed a Petition for Writ of Certiorari to the Supreme Court of the United States from a decision, dated January 24, 1979, of the United States Court of Appeals for the Second Circuit. In the course of compilation resulting in the final brief, the following footnote was inadvertently not included at the end of the first full paragraph, page 44.

** There is no question that the United States is also firmly bound by the effect of the letter dated July 10, 1973 from the office of the Prime Minister of The Bahamas to Dr. Kurt Waldheim, Secretary General of the United Nations. In the Matter of the Extradition Act, Chapter 57 and In the Matter of Robert L. Vesco, Magistrates Court, Commonwealth of The Bahamas (1973), an extradition proceeding commenced by the United States against the Petitioner, considered the parallel issue of whether a pre-existing treaty

between the United States and the United Kingdom of Great Britain continued in force between the United States and the Commonwealth of The Bahamas after the latter's becoming independent. In the cited case it was established by both the United States and the independent Commonwealth of The Bahamas that The Extradition Treaty signed in London, England on December 22, 1931 between the United States and the United Kingdom of Great Britain continued in full force and effect as to The Bahamas after the Bahamian Independence Order of July 10, 1973. Confirming the Bahamian succession to this Treaty, the Ministry of External Affairs, through its then Minister, issued a certification dated 19 November, 1973 stating that "Her Majestry in right of The Commonwealth of The Bahamas is a party to an arrangement for Extradition with the President of the United States of America being the extradition treaty signed at London, England on 22 December, 1931 which entered into force on the 4 June, 1935 and which has remained in force with the Commonwealth of The Bahamas." (Emphasis supplied) In conjunction with that certificate from the Ministry of External Affairs of the Commonwealth of The Bahamas, the Department of State of the United States, also, in a certificate dated November 8, 1973, and signed by the then Acting Secretary of State, also confirmed the efficacy of The Extradition Treaty in the following language: "I certify that the extradition treaty between the United States and

Great Britain, which was signed at London on December 22, 1931 and which entered into force on June 24, 1935 and thereupon became applicable to the Bahamas, continues in force between the United States and the Commonwealth of the Bahamas." (Emphasis supplied) Notably, the same party, Robert L. Vesco, was personally involved in the cited extradition proceeding, during the course of which the Supreme Court of the Commonwealth of The Bahamas also judicially determined the survival of the Extradition Treaty between the now independent Commonwealth of The Bahamas and the United States. In view of the above, the Petitioner herein and his counsel justifiably relied upon the survival of other treaties and conventions in the same category entered into between the United Kingdom of Great Britain and the United States, including the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. It is clear, therefore, that the United States also is firmly bound by the Convention. Accordingly, acting in full reliance upon the efficacy of the Convention, as well as the derivative principles of international law, the Petitioner and his counsel could properly conclude that the stated method of the service of process upon him, in the manner made, was legally insufficient under the terms of the Convention and, therefore, without consequence.

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Preliminary Statement

Respondent, International Controls Corp. ("ICC"), respectfully prays that the petition for the issuance of a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, entered in this case on January 24, 1979, be denied. That order merely held that service of the summons and complaint had been properly made upon petitioner Robert L. Vesco ("Vesco") in two separate actions commenced against Vesco by Respondent ICC in 1973 and 1974* and therefore affirmed orders of the

* *International Controls Corp.* v. *Robert L. Vesco, et al.* (73 Civ. 2518) and *International Controls Corp.* v. *Robert L. Vesco* (74 Civ. 1588). Both of these actions were commenced by ICC in the United States District Court for the Southern District of New York and are hereinafter referred to respectively as "the 1973 Action" and "the 1974 Action."

United States District Court for the Southern District of New York which had denied Vesco's motions to vacate default judgments entered against him in those actions.

This is the fourth time this matter is before the Court. On three prior occasions the petitioner was Vesco & Co., Inc., ("Vesco & Co.") a corporation which has been found to be Vesco's alter ego for the purpose of the enforcement of ICC's judgments against Vesco. In 1974 Vesco & Co. sought review of a January 15, 1974 order of the United States Court of Appeals for the Second Circuit (No. 73-1542). That order had affirmed the District Court's granting of a preliminary injunction in the 1973 Action and the refusal to dismiss the complaint therein as to Vesco & Co.

In 1976 Vesco & Co. sought a common law writ of certiorari to review a September 14, 1976 order of the Court of Appeals for the Second Circuit (No. 76-803). In that petition Vesco & Co. complained that the Court of Appeals declined to reassume jurisdiction of issues undecided on a prior appeal which had resulted in a remand to the District Court (*International Controls Corp.* v. *Vesco,* 535 F.2d 742 (2d Cir. 1976))—after Vesco & Co. had failed to file a timely appeal from the amended judgment entered on the remand—and argued that it had been denied due process because issues "crucial to the validity of the default judgments, remain unheard."

In 1977 Vesco & Co. again petitioned this Court for a writ of certiorari to review a June 3, 1977 decision of the Court of Appeals for the Second Circuit. There the question presented was whether the District Court had abused its discretion in denying Vesco & Co.'s motion, under Rule 60(b) of the Federal Rules of Civil Procedure, to vacate the default judgment in the 1973 Action.

On all three occasions referred to above, this Court declined to issue the writ sought.

Statement of the Case

Background

The January 24, 1979 decision of the Court of Appeals (Medina, J.), contains a detailed recitation of the procedural history of this matter. It fully supports the conclusion that Vesco for almost five years used his alter ego, Vesco & Co., to make various procedural attacks on the judgments entered against him and then, only after all of these attacks had failed, began his own assault on the judgments.

On June 7, 1973 ICC commenced the 1973 Action against a total of thirty-two defendants (including Vesco and Vesco & Co.). Twenty-two of said defendants had also been named as defendants in an action commenced in the same court by the Securities and Exchange Commission on November 27, 1972. The United States Court of Appeals for the Second Circuit in a decision on a prior appeal (*International Controls Corp.* v. *Vesco,* 490 F.2d 1334 (2d Cir. 1974), *cert. den.* 417 US 932 (1974)), noted that the complaint in the SEC action alleged:

> "A scheme of extraordinary magnitude, deviousness, and ingenuity in violation primarily of the anti-fraud provisions of the Securities and Exchange Act of 1934 . . . [and] charged that Robert Vesco masterminded and, with his cohorts, implemented a plan involving the manipulation of the assets and securities of a number of corporations controlled by Vesco including ICC", 490 F.2d at 1338-39.

The complaint in the 1973 Action contained eleven counts and alleged violations of the Securities Exchange Act of 1934, principally Section 10(b) and Rule 10b-5, and charged Vesco with fraud, self-dealing, waste of corporate assets and breach of fiduciary duty.

At the time it instituted the action, ICC also moved for a preliminary injunction enjoining Vesco & Co. from trans-

ferring certain assets, including 846,380 shares of ICC stock it held of record. The District Court's order granting such relief was affirmed by the Court of Appeals in the decision referred to above and, as indicated, Vesco & Co.'s petition to this Court for a writ of certiorari was denied.

The Default Judgment Against Vesco

On October 5, 1973, a default judgment was entered against Vesco who, after being served on July 30, 1973, failed to appear to answer the complaint.

In accordance with the October 5, 1973 judgment, a partial inquest was held which resulted in the entry on July 12, 1974 of a judgment against Vesco for $2,422,466.72. Although notice of said inquest was sent to Vesco he did not appear in connection therewith. Instead, Vesco & Co. appeared and argued for the first time that it should be given the right to defend the action on Vesco's behalf on the merits. This contention was rejected by the District Court (Hon. Charles E. Stewart, Jr.) and the inquest proceeded.

The Alter Ego Hearing

In response to ICC's motion for an order permitting it to so reach the assets of Vesco & Co., Judge Stewart promptly set down for a full hearing the issue of whether Vesco & Co. was merely an alter ego of Vesco. After holding such a hearing, with Vesco & Co. participating throughout, Judge Stewart entered a decision and order on August 22, 1975 in which he upheld ICC's contentions and directed Vesco & Co. to deliver its ICC stock to a court appointed receiver. Vesco & Co. has, to date, failed to do this.

Vesco & Co.'s Appeal from the Alter Ego Determination

On May 13, 1976, the United States Court of Appeals for the Second Circuit, rendered a decision on Vesco & Co.'s appeal from Judge Stewart's August 22, 1975 decision.

(*International Controls Corp.* v. *Vesco,* 535 F.2d 742 (2d Cir. 1976)). In effect, the court found that the default judgment entered on July 12, 1974, lacked the certification of finality required by Rule 54(b) of the Federal Rules of Civil Procedure and remanded the case to the district court with the instruction that the district court could enter a final judgment, with the appropriate Rule 54(b) certification, as to those claims for which further damages could not be proven, but could not enter a final judgment as to those claims for which further damages could be proven (535 F.2d at 749).

The Entry of the May 26, 1976 Amended Judgment

Immediately following the Court of Appeals' May 13, 1976 decision, ICC moved before the district court for the entry of an amended judgment, *nunc pro tunc,* containing the Rule 54(b) certification. After hearing Vesco & Co. in opposition to that application, Judge Stewart signed and entered the amended judgment.

Vesco & Co.'s Attempt to Appeal from or Obtain Vacatur of the May 26, 1976 Amended Judgment

Following the entry of the May 26, 1976 amended judgment, in response to letters addressed to the Court of Appeals by the attorneys for both Vesco & Co. and ICC, the Clerk of the Court of Appeals advised the parties that the prior appeal "is no longer before this court." This was on June 23, 1976, five days prior to the time that Vesco & Co. was required to file a Notice of Appeal from the May 26, 1976 amended judgment.

Although it was advised, in effect, that it would have to initiate a new appeal, Vesco & Co. waited until July 7, 1976, before filing its Notice of Appeal. Since no order extending the time for filing an appeal had been entered, the

Court of Appeals did not have jurisdiction over the appeal and, in response to ICC's motion, entered an order of dismissal on September 14, 1976. At the same time the court also denied Vesco & Co.'s motion for reconsideration of the issues raised on the prior appeal, obviously deciding not to enlarge the 14-day requirement contained in Rule 40 of the Federal Rules of Appellate Procedure. Vesco & Co.'s motion for reconsideration was not made for approximately three months after the Court's May 13, 1976 decision.

In December of 1976, Vesco & Co.'s petition to this Court for a common law writ of certiorari or mandamus, seeking a review of the Court of Appeals' September 14, 1976 order ("Vesco & Co.'s 1976 petition"), as well as its subsequent petition for rehearing, was denied. *Vesco & Co. Inc.* v. *International Controls Corp.*, 429 U.S. 1088, *reh. den.* 430 U.S. 976 (1977).

Meanwhile, Vesco & Co. also had moved in the District Court for an order enlarging its time to file the Notice of Appeal—upon the ground of excusable neglect—and also for an order, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, vacating and reentering the May 26, 1976 amended judgment. Both motions were denied by Judge Stewart in a decision dated October 27, 1976. The Court of Appeals affirmed, 56 F.2d 665 (2d Cir. 1977) and Vesco & Co.'s petition to this Court for a writ of certiorari was denied. *Vesco & Co.* v. *International Controls Corp.*, 434 U.S. 1014 (1978).

The 1974 Action

On April 8, 1974, ICC commenced a second action against Vesco by filing a complaint in the Southern District of New York which alleged that Vesco, in effecting transactions in shares of Empire Financial Corporation, had violated the federal securities law, had committed fraud, and had breached his fiduciary duty to ICC. On April 17, 1974, David M. Butowsky, ICC's Court-appointed Special

Counsel, served Vesco with the summons and complaint pursuant to an order of the District Court, issued on April 9, 1974. When Vesco failed to appear or answer the complaint, ICC obtained a default judgment in the amount of $2.9 million plus interest, which judgment was entered on September 11, 1974.

Vesco's Motions to Vacate Judgments and Denial by the District Court

Following the complete lack of success of Vesco & Co.'s attacks upon the judgments, Vesco himself began to attack the default judgments entered against him. In July 1977, Vesco moved, pursuant to Rule 60(b)(4), to vacate the default judgment in the 1973 Action, on the ground that service had not properly been made upon him. In support of that motion, Vesco submitted an undated affidavit which, although it contested the service of the summons and complaint, was carefully drafted so that Vesco never denied that he had actually been present in the Brace Ridge Road house when the summons and complaint were left there. Judge Stewart denied the motion in an order dated February 1, 1978.

Vesco made a motion, on the same grounds, in January 1978, seeking to vacate the default judgment in the 1974 Action. No evidence was presented by Vesco concerning the circumstances surrounding the challenged service of process. This motion was denied by Judge Stewart in an order entered on May 3, 1978. Vesco appealed from both orders.

Facts Surrounding Service of Summons and Complaint on Vesco in the 1973 Action

The service of the summons and complaint must be judged in light of the extraordinary factual circumstances of the case, which have been duly noted by the Courts which have considered the previous appeals involving Vesco.

In its January 1974 decision, the Court of Appeals for the Second Circuit commented:

> "[T]he appellants before us, but not including Mr. Vesco himself, who we note parenthetically, has refused to return to the Southern District of New York and seems to be safely ensconsed in Nassau, the Bahamian capital beyond the reach of the United States." *International Controls Corp.* v. *Vesco,* 490 F.2d 1334, 1338 (2d Cir. 1974).

In a similar vein, the Second Circuit noted in its 1977 decision:

> "It was Mr. Vesco's 'multifarious manipulation' that led him to absent himself from this country and to be unavailable for service of process. This persistent refusal to appear in any American court is the single most contributing cause to the procedural problems that have culminated in this appeal. . . ." *International Controls Corp.* v. *Vesco,* 556 F.2d 665 (2d Cir. 1977), *cert. den.,* 434 U.S. 1014 (1978).

In view of the circumstances surrounding Vesco's flight from the United States, it is understandable that ICC anticipated problems in attempting to effect service upon him. Therefore, in July of 1973, an application was made to the District Court for an order appointing an associate of the firm representing ICC to effect service on Vesco.* (A34 of Petition for Writ of Certiorari ("Petition")).

On July 27, 1973, Judge Stewart signed an order authorizing Lois S. Yohonn to effect service on Vesco and two days later, on July 29, 1973, a further order was entered specifying that Ms. Yohonn could effect service by

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* On June 15, 1973, an order had been entered permitting Bahamian attorneys to effect service on Mr. Vesco as well as numerous other defendants but service was not effected under the terms of that order.

depositing a copy of the summons and complaint upon the premises of Vesco's last known residence in Nassau, Bahamas and mailing a copy thereof to Vesco at the address of his last known residence. (A36-A37)

In accordance with the terms of the July 29, 1973 order, service was effected on Vesco on July 30, 1973. Ms. Yohonn had spent the afternoon and evening of July 29th and most of the day on July 30th searching for Vesco at various places in the Bahamas where she had been told he frequented. (A39) In the late afternoon of July 30, 1973, Ms. Yohonn went to Vesco's residence on Brace Ridge Road and, when confronted by two guards standing near a locked gate to the driveway, inquired as to whether it was Vesco's house telling the guards that she wanted to speak with Vesco. (A39-A40) One of the guards went into the house and, while Ms. Yohonn was waiting for him to return, a car containing several persons including a woman, who Ms. Yohonn believed to be Mrs. Vesco, and two children drove up. (A41) Shortly thereafter, a boy of approximately 16 or 17 years of age came out of the house saying "my father said to ask you what you want." She replied that she wanted to serve Vesco with a summons and complaint and, when the boy jumped back, she threw the complaint at him. He caught it, threw it back at her and ran back into the house. (A42) She thereupon handed the papers to one of the guards who became belligerent and threw them at her. According to Ms. Yohonn's affidavit of service, the guard told her to get out and threw the complaint out into the road. (A42)

Ms. Yohonn then returned to her hotel, called Judge Stewart, informed him of what happened and requested authorization to use the ancillary order which had been entered on July 29th. (A43) Receiving such authorization, Ms. Yohonn returned to the Brace Ridge Road address and threw the summons and complaint on the lawn a few feet in front of the house and quickly got back into her

taxi. (A44) At this point, two guards, one brandishing a piece of pipe and the other a stick, came running through the gate and one of them opened the door of the taxi and ordered her to get out. (A45) After a few tense moments and with the assistance of the taxi driver, Ms. Yohonn was able to extricate herself from the difficult situation, not before noticing, however, that Vesco's son with whom she had spoken earlier was standing in the middle of the road watching the altercation. (A46)

Upon returning to New York on August 1st, Ms. Yohonn, in accordance with Judge Stewart's order, mailed an additional copy of the summons and complaint to Vesco at the Brace Ridge Road address. (A48)

Facts Surrounding Service of Summons and Complaint on Vesco in the 1974 Action

On April 9, 1974, at ICC's request, the District Court issued an order authorizing David M. Butowsky, ICC's Court-appointed Special Counsel, to effect service and permitting service to be made (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure or (ii) by leaving a copy of the summons and complaint "upon the premises of the defendant's last known residence in Nassau, the Bahamas" and by mailing a copy thereof to Vesco at either his post office box or to the address of his last known residence in Nassau, the Bahamas. (A102-A103)

In an affidavit of service, sworn to April 22, 1974, Mr. Butowsky stated that on April 17, 1974 he and the United States Consul had proceeded to Brace Ridge Road, Nassau, Bahamas, which was known to him to be Vesco's last known residence in the Bahamas, that he was prevented from reaching the house by two guards at the gate and that after stating that he wished to hand the summons and complaint to Mr. Vesco, one of the guards replied that they were "instructed not to accept any papers." Mr. Butowsky

further states in his affidavit that he dropped the envelope containing the summons and complaint on the driveway and asked the guards to deliver it to Vesco. On April 17, 1974, Mr. Butowsky also mailed, by registered mail, a copy of the summons and complaint to Vesco's listed post office box. (A105-A108)

The January 24, 1979 Decision of the Court of Appeals

Vesco appealed from Judge Stewart's orders of February 1, 1978 (in the 1973 Action) and May 3, 1978 (in the 1974 Action), denying his motions to vacate the default judgments. He argued that the service of the summons and complaint in both actions was invalid as a violation of due process and as not in compliance with the requirements of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Convention"). The Court of Appeals for the Second Circuit, in a lengthy opinion, affirmed Judge Stewart's orders in a decision dated January 24, 1979 (opinion by Medina, J.). Vesco is now seeking review of that January 24, 1979 decision.

Reason for Denying the Petition

None of the seven questions presented by the Petitioner presents the type of situation which Rule 19 of this Court's Rules considers necessary for this Court to grant a petition for a writ of certiorari. The question of whether the particular mode of service of process utilized in this case comports with due process, although stated as if it raised an important issue for this Court's consideration, can only be answered by an examination of the facts of the case; such facts are so unique that a review of the case by this Court will hardly affect other litigants.

For the same reason the questions involving the interplay of the several methods of service of process, whether

the Convention affects Federal Rule of Civil Procedure 4(i)(I)(E), and whether the Convention is applicable to service of process in the Bahamas neither raise issues important enough for this Court to consider nor present problems sufficiently divorced from the special facts of the case to warrant further elucidation by this Court.

More important than these reasons of judicial economy, the petition should be denied for the very basic reason that the decision below discloses that the Court considered the applicable principles of law and applied them correctly. Nothing in the decision of the Court of Appeals suggests that it is adopting a rule that "actual notice" need not be a goal of any method of process. Petitioner's definition of the issue is completely erroneous; the Court of Appeals properly examined the facts and found that the service of the summons and complaint, as authorized by the order of the United States District Court, was "reasonably calculated, under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit" (A19-A20). In so doing, the Court of Appeals did not make any broad statement that actual notice need not be given, or in any way relax the well-known, but necessarily flexible, standards of due process enunciated by this Court.

The Court of Appeals more than adequately considered the precepts of international law in its decision that the Convention was inapplicable to service of process made in the Bahamas. Since there is no disputing the fact that the Bahamas is not a signatory to the Convention, nor succeeded to it after its independence from the United Kingdom, the question of any conflict between the Federal Rules and the Convention does not arise. Even if such a question had to be resolved, its significance is not apparent from this case. Even if this Court thought that this issue merits its attention it should, we submit, postpone a deliberation on the potential conflict until a case arises which presents the matter in more well-defined terms.

Therefore, for the reasons that the decision below was *first,* correctly decided, *second,* is not in conflict with any decisions of this Court or other Courts of Appeal, *third,* presents no significant questions the resolution of which would aid other litigants, and *fourth,* does not present certain issues in a manner in which it can be discerned if a true conflict exists which needs to be resolved, the petition for a writ of certiorari should be denied.

The Decision of the Court of Appeals Was in Accord With the Standards of Due Process

The Court of Appeals decision quite clearly sets forth the proper considerations of due process which are applicable when the validity of the service of process is challenged. First the Court laboriously examines whether extraterritorial service is allowed at all, and upon deciding that it is, the Court then points out the fact that the methods of service of process in Federal Rule of Civil Procedure 4(d) are available, as well as those in Rule 4(i). Only then does the Court turn to Rule 4(i)(I)(E), and rule upon the District Court's authority to order an alternative manner of service of process. The Court very appropriately states the Due Process standard:

> "The Supreme Court has long recognized that no one form of substitute service is favored over any other so long as the method chosen is reasonably calculated under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit and an opportunity to present his defense.[9] The constitutional determination is derived from the necessities of each case rather than from a preconceived notion of what will provide actual notice in every case. *Hanson* v. *Denckla,* 357 U.S. 235 (1958); *McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957); *Walker* v. *City of Hutchinson,* 352 U.S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Milliken* v. *Meyer,* 311 U.S. 457 (1940)."

(A19-A20).

Judge Medina was not, as Vesco claims, abolishing the requirements of actual notice in particular circumstances; he was stating the long established principles that whether service is reasonably calculated to afford a potential defendant with actual notice must be judged by the "practicalities and peculiarities of the case." *Mullane* v. *Central Hanover Bank & Trust Co., supra* at 315. It was certainly not a departure from judicial standards for the Court of Appeals to then examine the facts of the case to see if "the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Mullane* v. *Central Bank & Trust Co., supra* at 315.

The facts, as summarized above, point to but one conclusion: that if Vesco were to be served with the summons and complaint at all, it would be only by some alternative method of process. Miss Yohonn's affidavit stated in detail the facts which led her to the belief that not only did Vesco frequent the house at Brace Ridge Road, he was actually present at that time. The Court of Appeals decision can hardly be characterized as requiring "the voluntary surrender of prospective defendants to marauding process servers" (27 of Petition). The decision simply holds that since Vesco had absented himself from the United States, for the well-known purpose of avoiding lawsuits, since he was not able to be served personally by virtue of his self-imposed seclusion, and since he was known to frequent a particular residence and indeed was actually present at that residence at the time of the events leading to the service of process, the method adopted by the orders of the District Court and employed by the process server was reasonably calculated to give Vesco actual notice of the action.

The Court of Appeals also found that the facts justified the conclusion that the service of process in the 1974 Action was reasonably calculated to give Vesco actual notice of the action. Mr. Butowsky, the process server in the 1974

Action, attempted personal service, which was refused and thereupon followed the directives of the order appointing him to serve process. This order allowed him to serve process in the same manner as was employed in the 1973 Action. The Court of Appeals decided that based on Mr. Butowsky's knowledge that Vesco continued to frequent the Brace Ridge Road residence, that the service met the constitutional standards previously set forth in its discussion of the service of the summons and complaint in the 1973 Action.

It is worth noting that ICC is certainly entitled to learn from experience and that the prior history of service upon Vesco lends further weight to the reasonableness of Mr. Butowsky's service.

The Court of Appeals Properly Applied International Law

Vesco's contention on this point is that the Court of Appeals ignored the official letter dated July 10, 1973, from the Office of the Prime Minister of the Bahamas to the Secretary General of the United Nations notifying the United Nations that the Bahamas succeeded to each treaty entered into by the United Kingdom on behalf of the Bahamas. The Court of Appeals did not ignore this succession by the Bahamas; it took the precautionary measure of discerning whether the United Kingdom had ever entered into the Convention on behalf of the Bahamas. The uncontradicted evidence conclusively shows that this threshold event never occurred (A24-A27). Consequently, the Court of Appeals correctly decided that the Bahamas had not succeeded to this Convention, and that the Convention's terms are inapplicable to service of process in the Bahamas. This is not an incorrect application of international law, but rather the only interpretation open under the principles of international law as they apply to the facts of this case.

Since this quite properly disposes of this issue, the Court of Appeals considered the potential conflict between the

Convention and the Federal Rules of Civil Procedure only in passing. We respectfully submit, however, that the Court of Appeals was correct in its determination that the Convention does not abrogate the Federal Rules. In any event, respondent respectfully submits that this Court reject Petitioner's invitation to resolve any possible conflict until a more proper case is presented.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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